Quarterly Report
of the
ATTORNEY GENERAL
of
ALABAMA

For The Period
From October 1, 1955
Through December 31, 1955
VOLUME 81

JOHN PATTERSON, Attorney General

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QUARTERLY REPORT

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TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from October 1, 1955, through December 31, 1955, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama, 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

JOHN PATTERSON,
Attorney General.

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OPINIONS

October 19, 1955

Hon. T. C. Almon,
Judge of Probate,
Morgan County,
Decatur, Alabama.

Licenses—License Tags—Motor Vehicles.

1. The three dollar tag for "pick-ups" or "pick-up trucks" under Act No. 775, General and Local Acts 1953, page 1046, authorized only when applicant is owner of the vehicle and such vehicle is the only mode or method of transportation owned by the applicant or available for his use in the household in which the applicant resides.

2. If automobile of wife or son of applicant, residing in same household with applicant, is available for applicant's use, the three dollar tag for "pick-ups" or "pick-up trucks" not allowable.

3. The fact that a "pick-up" or "pick-up truck" is also used in business of applicant, who is otherwise qualified under Act No. 775, supra, does not bring such vehicle out of terms of statute.

4. The fact that a partnership owns a truck used exclusively in its business would not prevent one of its partners, otherwise qualified under Art No. 775, supra, from being entitled to the three dollar tag.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion bearing date of October 11, 1955, is as follows:

"The 1953 Session of the Legislature passed an Act, which is found in Volume 2, Page 1046, Regular Session of 1953, authorizing the issuance of a $3.00 tag for motor trucks which have a box or express type body of ¾ of a ton capacity, or less, and commonly known as pickups.

"Will you give me the benefit of your Opinion on the following:

"1. A man and his wife live together, both work, he owns a pickup truck, which is assessed in his name and she owns an automobile, which is assessed in her name. He wants to make the affidavit that there is no other mode or method of transportation owned by him, or available for his use in the household in which he resides.

"Is there any inference that his wife's car is available for his use. I do not see how a man and his wife could live together and he not occasionally drive his wife's car.

"2. We quite frequently have the same situation where the father owns a pickup truck and has a grown son living at home, who has a car and who works, the father wants to make an affidavit that there is no transportation available for his use in the household in which he resides, although the son resides there who owns an automobile.

"3. In a situation where a man has a pickup, and is in business and uses the pickup in his business, but it is the only automobile owned by him or available for his use in the household in which he resides. Is he entitled to the $3.00 tag on the pickup to be used in business.

"4. Another situation that I have had, is a case of a partnership, where the partnership owns a truck which is used exclusively in the business, and one of the partners owns a pickup truck, which he uses for his own use, would he be entitled to the $3.00 tag upon making the affidavit required by law.

"We are now selling tags every day, so please give me your Opinion on these matters as soon as possible."

Section 1 of Act No. 775, General and Local Acts 1953, page 1046, provides as follows:

"Section 1. Any other provisions of law to the contrary notwithstanding, the license and registration fee on motor vehicles designated as motor trucks which have a box or express type body of three-fourths of a ton capacity or less, and commonly known as 'pick-ups' or 'pick-up trucks' shall be Three Dollars ($3.00). Provided, however, any applicant for such motor vehicle license shall, upon making application for same, execute, under oath, a statement in writing to the officer issuing such license reciting that **such applicant is the owner of the vehicle and that such vehicle is the only mode or method of transportation owned by the applicant or available for his use in the household in which the applicant resides.**" (Emphasis supplied.)

In an opinion of this office reported in Quarterly Report of Attorney General, Vol. 73, page 41, dealing with the statute in question, it was stated:

"Under the very terms of the law itself, the three dollar tag is confined to a pick-up truck which is the only mode or method of transportation owned by the applicant or available for his use in the household in which he resides. This seems to clearly indicate that only one pick-up truck is contemplated and that if the applicant for a three dollar tag owns or has available for his use in the household in which he resides another pick-up truck or any other means of transportation, then he would not be eligible for the three dollar tag on any of his pick-up trucks. . . ."

In regard to the first two situations presented in your inquiry, the question of the availability of other transportation for the use of the applicant in his household is one of fact. It is conceivable, although very improbable, that an automobile owned by the wife or son of an applicant, residing at the home of the applicant, would not be available for use by the applicant. If such an applicant is willing to execute the required affidavit, subjecting himself to criminal prosecution in the event it were not true, I think the probate judge may properly issue the three dollar tag in question. Even the applicant's occasional or isolated use of the automobile of his wife or son would place such an automobile in the availability category.

In regard to the third situation presented in your inquiry, I am of the opinion that such an applicant would be entitled to a three dollar tag upon the execution of the required affidavit. The mere fact that the "pick-up" may also be used in his business does not bring such vehicle out of the terms of the statute.

The fourth situation set out in your inquiry presents a question of ownership. Although an applicant, otherwise qualified, may be a member of a partnership which owns another vehicle, such, in my opinion, does not amount to an individual ownership. The partnership is a separate legal entity. Therefore, in my opinion, your fourth inquiry should be answered in the affirmative.

Yours very truly,

JOHN PATTERSON,
Attorney General.

October 19, 1955

Hon. W. L. Horn, Commissioner
Department of Revenue
CAPITOL

Statutes—Constitutionality—Gasoline and Gasoline Tax—Refunds.

1. Act No. 38, General Acts 1955 (Ms.), approved April 1, 1955, insofar as it attempts to provide for refund of a portion of State tax paid on gasoline for use in commercial fishing boats, is unconstitutional.

2. That part of Act No. 38, General Acts 1955 (Ms.), approved April 1, 1955, insofar as it increases the refund on tractor gasoline from 5 cents per gallon to 6 cents per gallon is a valid enactment.

Opinion by Assistant Atttorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of September 23, 1955, is as follows:

"Act No. 323, General and Local Acts 1949, page 469, provides for a refund of a portion of the State tax paid on gasoline when the gasoline is used in propelling or operating tractors used exclusively for agricultural purposes. The amount of refund prescribed in said Act is five cents (5c) per gallon. Although not material to this inquiry, Act No. 323 was amended by Acts No. 271 and 280, General Acts 1953, pages 340 and 345, respectively.

"Act No. 38 of the Regular Session of the Legislature of 1955, approved April 1, 1955, copy of which is enclosed, purports to amend Act No. 323 by providing for the refund of said gasoline tax to purchasers of gasoline for use in operating or propelling commercial fishing boats, and also by raising the amount of the refund from five cents (5c) to six cents (6c).

"An examination of Act No. 38 reveals that Section 1 of Act No. 323 was not amended so as to bring commercial fishing boats within the intent of the law. Section 2 of Act No. 323 was not amended and the definition of 'refund gasoline' as used in Act No. 323 is still defined as 'gasoline used as motor fuel for operating or propelling tractors used exclusively for agricultural purposes.' Section 5 of Act No. 323 was not amended so as to include commercial fishing boats and it appears that the purchaser of the gasoline used in such boats is not entitled to a refund.

"Section 7 of Act No. 323 was not amended to include commercial fishing boats ,and it still reads, 'No refund shall be made unless the Commissioner is satisfied that the gasoline with respect to which the refund is claimed was used in a tractor, or tractors, . . .'

"In view of the above discrepancies between the provisions of Act No. 323 and the amending Act No. 38, your official opinion is requested with respect to the following:

"1. Is said Act No. 38, or any part thereof, in conflict with Section 45, Constitution of Alabama 1901 and, therefore, unconstitutional?

"2. Is said Act No. 38 or any part thereof, when considered with said Act No. 323 which it purports to amend, so uncertain in meaning, incomplete, vague, indefinite, inconsistent, or unworkable as to be unenforceable, and, therefore, inoperative and void within the purview of former decisions of the Supreme Court of Alabama?

"3. Section 2 of said Act No. 38 amends Section 3 of said Act No. 323 raising the amount of refund from five cents (5c) to six cents (6c) of the

State excise tax paid on each gallon of gasoline. If that part of Act No. 38 relating to refunds of gasoline tax on gasoline purchased and used in operating or propelling commercial fishing boats is inoperative and void, is that part of said Act effective which specifies the amount of refund to be six cents (6c) of the State excise tax paid on each gallon of gasoline purchased and used in operating or propelling tractors used exclusively for agricultrual purposes or is said Act No. 38 void in its entirety so that the amount of refund is still five cents (5c) on each gallon under Act No. 323?"

My answer to your first inquiry is in the affirmative, insofar as Act No. 38, General Acts 1955 (Ms.), approved April 1, 1955, attempts to include within its provisions a refund of a certain portion of the State gasoline tax on gasoline used to operate commercial fishing boats.

Act No. 323, General and Local Acts 1949, page 469, provides for a refund of a portion of State gasoline tax paid on gasoline used solely in propelling or operating tractors used exclusively for agricultural purposes. Section 1 of said Act sets out the purpose of the Act and states in no uncertain terms that the sole purpose of the Act is to promote agriculture in Alabama and to encourage and foster the progress of the farmers in this State by making it possible for them to use extensively mechanized equipment in competition with the farmers and agricultural interests of surrounding states.

Act No. 38, supra, is an attempt to amend Act No. 323, supra, and the title to Act No. 38, supra, is as follows:

"To amend Act No. 323, H. 35, approved August 2, 1949, which provides for a refund of a portion of the state tax paid on gasoline used to propel tractors (1949 Acts 469)."

From the title of Act No. 38, supra, it appears that the entire Act namely, Act No. 323, is to be amended by the amendatory act. In truth and in fact, the only amendment to Act No. 323, supra, except as relating to a refund of the tax paid on gasoline used in tractors, is an attempt to include within its purview a refund of certain portions of the State tax on gasoline used in commercial fishing boats.

In order for an amendatory act to meet the requirements of Section 45 of the Constitution of Alabama 1901, the subject matter of the amendatory act must be germane to, suggested by, and supplemental to the subject of the Act sought to be amended as expressed in the title of the original Act. **City of Birmingham v. Merchants Cigar and Candy Co.**, 235 Ala. 204, 178 So. 220; **State ex rel. Bates v. Baumhauer**, 239 Ala. 476, 195 So. 869; **Butler v. Guaranty Savings and Loan Association**, 247 Ala. 4, 22 So. 2d 323.

As stated above, the purpose of Act No. 323, supra, as expressed in Section 1 thereof, was to promote the agricultural interest of the State of Alabama, to make it possible for the farmers of this State to use mechanized

equipment, and to compete with farmers and agricultural interests in surrounding states,by granting to the farmers in Alabama a refund of a portion of the State tax paid on gasoline used by them in propelling or operating tractors used exclusively for agricultural purposes. With this definite purpose so stated in the Act, any amendment thereto must be germane to, suggested by, or supplemental to the subject thereof.

Certain it is that the attempted inclusion by amendment to Act No. 323, supra, of a refund on a portion of the State gasoline tax on gasoline used in commercial fishing boats is not in any way germane to, suggested by, or supplemental to the subject expressed in the body and the title of Act No. 323, supra. You are, therefore, advised that, in my opinion, Act No. 38, supra, insofar as it attempts to include within the purview of Act No. 323, supra, a refund of a portion of the State gasoline tax paid on gasoline used in propelling commercial fishing boats, is unconstitutional and void.

My answer to your first question makes it unnecessary that I answer your second question.

In answer to your third question, you are advised that Act No. 38, supra, insofar as it amends Section 3 of Act No. 323, wherein the refund of the portion of the State tax paid on gasoline used in propelling or operating tractors used exclusively for agricultural purposes is increased from 5 cents to 6 cents per gallon, is a valid enactment. This part of the amendment to Act No. 323, supra, is germane to, suggested by, and supplemental to the purpose expressed in the original title and body of Act No. 323, supra, and is a valid enactment.

You are, therefore, advised that the proper refund of the portion of the State tax paid on gasoline used in propelling or operating tractors used exclusively for agricultural purposes should be increased from 5 cents to 6 cents per gallon.

Yours very truly,

JOHN PATTERSON
Attorney General

October 20, 1955

Hon. W. L. Horn, Commissioner
Department of Revenue
CAPITOL

Stamps—Licenses.

Under the provisions of Title 51, Section 606, Code of Alabama 1940, as amended by Act No. 399, General Acts 1955 (Ms.), approved September 9, 1955, every person who engages in or carries on the business

of issuing or selling trading stamps to merchants should procure a license in each county in which such person engages in such business in addition to the State license.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of October 11, 1955, is as follows:

"On September 9, 1955, Title 51, Section 606, Code of Alabama 1940, commonly known as the 'trading stamp license', was amended by Act No. 399 of the Regular Session of the 1955 Legislature, approved September 9, 1955. The amendment served to completely eliminate certain material parts of Section 606, as amended, **supra**, which now reads, as amended, as follows:

"'§ 606. Trading Stamps.—Every person who engages in or carries on the business of issuing or selling to merchants, trading stamps, or any device or substitute therefor, or any stamps or certificates of like character which are to be given by merchants to purchasers of goods, wares or merchandise and which said stamps, certificates or devices, or substitute therefor, the person issuing or selling the same agrees to accept in payment for goods, wares, and merchandise kept on hand by himself or another for redemption or for distribution by the person issuing or selling such stamps or certificates, shall pay to the State of Alabama a privilege or license tax of one thousand dollars per annum. Provided further that the provisions of this Act shall not apply to any coupon, ticket, certificate, card or other similar device issued or distributed by a manufacturer or packer which is redeemable for any goods, wares or merchandise by the manufacturer or packer, or its agents or independent contractor acting for redemption.'

"Under the terms of the amendment, the new law was effective October 1, 1955.

"It will be noted in comparing Section 606, **supra**, prior to amendment, and the statute after amendment, that a considerable portion of the statute was deleted. Prior to amendment, Section 606 specifically provided that the license was to be paid directly to the State Department of Revenue in the sum of $1,000.00 and that the license taxpayer should at the same time execute a bond payable to the State of Alabama to insure payment to the Department of Revenue of an additional privilege or license tax of 3% of the gross receipts of such business in this State for one year.

"It will, therefore, be seen that by the deletion of this portion of the statute it is no longer directed that the license be paid directly to the State Department of Revenue and the bond feature, as well as the gross receipts tax, has been completely eliminated.

"As amended, Section 606 reads that the license taxpayer, in purchasing the license ' . . . . shall pay to the State of Alabama a privilege or license tax of one thousand dollars per annum.'

"Title 51, Section 831 (a), as amended, Code of Alabama 1940, provides as follows:

" 'Whenever a license is levied in this title, there shall be collected both a state and county license for each place of business, except as specifically otherwise provided.'

"Subsection (c) of Section 831, as amended, **supra,** reads as follows:

" 'There is hereby levied for the use and benefit of and to be paid to the county in which the license is issued, in addition to all license taxes levied under the provisions article 1 of chapter 20, for state purposes and which are payable to the judge of probate or commissioner of licenses, a sum equal to fifty percent of the amount levied for state purposes, except as otherwise specifically provided.'

"Section 831 (c), as amended, **supra,** has been further amended by Act No. 572 of the Regular Session of the 1955 Legislature, approved September 12, 1955 and effective October 1, 1955. However, the amendment as provided by Act No. 572, **supra,** relates only to the distribution of State and county licenses and has not otherwise affected Subsections (a) and (c) of Section 831. In other words, insofar as the collection of the tax is concerned, Section 831 has not been changed.

"The foregoing being considered, the Department, in administering this law, is now faced with the following questions:

"1. Does the trading stamp license levied under said Section 606, as amended, **supra,** by Act No. 399, **supra,** require the payment of a county license under the provisions of Section 831 (a) and (c) of one-half of the amount of the State license, or namely, $500.00 for the county in addition to the $1,000.00 license payable to the State?

"2. If a county license is also required in addition to the State license, is it necessary for the license taxpayer to take out such State and county license in each county in which he does business in trading stamps in this State?

"Your official opinion is respectfully requested as to each of these questions in view of the fact that we are confronted with several cases now pending before the Department in which these problems have arisen. We also request that you please give us your opinion at the earliest possible convenience as these people will have to purchase the necessary licenses prior to November 1, 1955 or suffer penalties for delinquency."

My answer to your first question is in the affirmative.

Act No. 399, General Acts 1955 (Ms.), approved September 9, 1955, amending Title 51, Section 606, Code of Alabama 1940, has one effect, namely, by deleting a material part of the original Code section, this amendment puts a flat $1,000 per year State license tax upon persons who engage in or carry on the business of issuing or selling to merchants trading stamps, or any device or substitute therefor.

Title 51, Section 831, Subsection (c), Code of Alabama 1940, as last materially amended by Act No. 700, General and Local Acts 1951, page 1207, levies, for the use and benefit of the several counties of the State, a license tax of 50% based on the amount of the State tax levied under the provision of Title 51, Article 1, Chapter 20, Code of Alabama 1940.

Section 606, supra, is a part of Title 51, Article 1, Chapter 20, Code of Alabama 1940. Not being otherwise specifically provided, it therefore follows that every person engaging in the business of issuing or selling trading stamps to merchants comes within the purview of Section 831, Subsection (c), supra, and should pay one-half of the State license tax for the use and benefit of counties in which such person is engaging in or carrying on the business of selling trading stamps.

My answer to your second inquiry is also in the affirmative.

Subsection (a) of Section 831, as amended, supra, provides as follows:

"Whenever a license is levied under this title, there shall be collected both a state and county license for each place of business execpt as specifically otherwise provided."

In my opinion, the amendment to Section 606, supra, has the effect of placing the license on persons engaged in the business of selling trading stamps on the same basis as other privilege or occupational licenses levied by Title 51, Article 1, Chapter 20, Code of Alabama 1940. Nowhere do I find in Section 606, as amended, supra, that it is expressly specified that persons engaged in the business of selling trading stamps should not secure a State and county license for each place of business.

You are, therefore, advised that, in my opinion, such person is liable for a State and county license in each county in which such person engages in the business of selling trading stamps to merchants. Quarterly Report of Attorney General, Vol. 66, page 36.

Yours very truly,

JOHN PATTERSON
Attorney General

October 27, 1955

Lt. Col. Donald V. Gassie
Staff Judge Advocate
Headquarters
The Army Aviation Center
Camp Rucker, Alabama

Motor Vehicles—Licenses—Taxation—Military and Naval Affairs—Soldiers' and Sailors' Civil Relief Act—United States—Ad valorem Taxes—Tax Assessors—Automobiles—Opinions Overruled, Modified and Distinguished.

1. Nonresident military personnel, owning private automobiles and living in Alabama solely by reason of complying with military orders, are not subject to Alabama ad valorem tax on said automobiles, and may obtain Alabama license tag upon payment of license or registration fee.

2. Opinion reported in Quarterly Report of Attorney General, Vol. 64, page 53, and letters to Hon. D. W. Crosland, Tax Assessor, Montgomery County, Montgomery, Alabama, under date of May 14, 1953, and to Commanding General, Redstone Arsenal, Huntsville, Alabama, under date of September 14, 1955, overruled in part.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

I have your inquiry of October 11, 1955, which asks whether or not nonresident military personnel, owning private automobiles and presently living in the State of Alabama solely by reason of military orders, are required to pay ad valorem taxes on said automobiles as a condition precedent to their obtaining an Alabama license tag.

In my opinion, such nonresident military personnel living in the State of Alabama solely by reason of military orders may purchase an Alabama license tag without paying ad valorem tax on said automobile.

The above question has been decided both ways by this office. In view of the conflict in the opinions of the Attorney General, such opinions should be reconsidered.

In an opinion of this office under date of November 9, 1948, reported in Quarterly Report of Attorney General, Vol. 53, page 59, it was held that "nonresident persons who are entitled to the benefits of said act (The Soldiers' and Sailors' Civil Relief Act) and who elect to purchase an Alabama motor vehicle license rather than obtain such license from the state of

their domicile or residence, **are not liable** for the Alabama ad valorem tax upon such motor vehicle. Such election to obtain an Alabama motor vehicle license may be made without penalty within such time as may be obtained without penalty in the state of his residence or domicile (as construed by the Soldiers' and Sailors' Civil Relief Act)." (First parenthesis ours.) In a subsequent opinion of the Attorney General under date of September 29, 1951, reported in Quarterly Report of Attorney General, Vol. 64, page 53, the above quoted part of the opinion under date of November 9, 1948, supra, was overruled. In the opinion under date of September 29, 1951, supra, this office stated:

> "On further consideration, I find the above statement incorrect. As explained above, nonresident servicemen, who elect to obtain Alabama motor vehicle licenses rather than obtain such licenses in the state of their domicile, do not come within the coverage of the Soldiers' and Sailors' Civil Relief Act. As a condition precedent to the issuance of Alabama motor vehicle licenses, such non-resident servicemen would, therefore, be required to pay ad valorem taxes on motor vehicles brought into the State after the first day of October and before the tax assessor has completed his assessment. Title 51, Section 704, Code of Alabama 1940, as amended by Act No. 314, General Acts 1945, page 504. (The completion of the assessment by the tax assessor is required to be made not later than the last Monday in February. Title 51, Section 57, Code of Alabama 1940.)"

The 1951 opinion, supra, was affirmed and followed by this office after the decision in 1953 in **Dameron v. Brodhead,** infra. See letter of this office under date of May 14, 1953, addressed to Hon. D. W. Crosland, Tax Assesor, Montgomery County, and letter under date of September 14, 1955, to Commanding General, Redstone Arsenal, Huntsville, Alabama.

There are two separate and distinct taxes levied in Alabama with respect to motor vehicles. One tax is an ad valorem tax levied according to the value of the motor vehicle. Motor vehicles, the same as other personal property, are subjects of ad valorem taxation in Alabama. Title 51, Section 21, subsection (e), Code of Alabama 1940. The ad valorem tax is levied upon such automobiles as the ad valorem tax is levied upon any other personal property in Alabama. Title 51, Section 19, Code of Alabama 1940. Such tax is levied according to the value of the automobile, and has no relation whatsoever to the use of the automobile on the public highways.

Alabama, as stated above, levies another tax known as a license or registration fee on automobiles kept for private use. Title 51, Section 693, Code of Alabama 1940, as amended by Act No. 206, General and Local Acts 1951, page 468. The amount of this license or registration fee, as distinguished from the ad valorem tax, is three dollars for automobiles designed and used primarily for private passenger purposes. Act No. 315, General and Local Acts 1951, page 610. This latter license or registration fee is said to be in relation

to the use of the public highways. **Williams v. Albany,** 216 Ala. 408, 113 So. 257.

It so happens that the State of Alabama has designed a special method for collecting the ad valorem tax on automobiles. Instead of collecting the ad valorem tax on automobiles at the same time and in the same manner in which the ad valorem tax is collected on other personal property, the ad valorem tax on automobiles is required to be collected before the license or registration fee to operate a motor vehicle on the public highways is obtained. This method is said by the statute "to prevent motor vehicles . . . from escaping taxation and to provide for the more efficient assessment and collection of taxes due on same." Title 51, Section 704, Code of Alabama 1940, as amended by Act No. 314, General Acts 1945, page 504. By the terms of Section 704, as amended, supra, a person desiring to operate a motor vehicle in Alabama and pay the license or registration fee and obtain a metal tag must, as a condition precedent, return the motor vehicle for ad valorem taxation to the tax assessor of the county "in which he resides," and obtain a receipt from the tax collector of the county "where the owner of said vehicle resides" showing that said ad valorem tax has been paid. If no ad valorem tax is due in respect to said motor vehicle, then it is the duty of the tax assessor to so certify to the probate judge or other officer empowered by law to issue motor vehicle licenses, and, in such event, the probate judge may issue the motor vehicle license without the payment of the ad valorem tax. Biennial Report of Attorney General, 1936-1938, page 552.

Title 50 App., U. S. C. A., Section 574, provides as follows:

"§ 574. Residence for tax purposes

"(1). For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purpose of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district: **Provided,** That

nothing contained in this section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to October 6, 1942.

"(2) When used in this section, (a) the term 'personal property' shall include tangible and intangible property (including motor vehicles), and (b) the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: **Provided,** That the license, fee, or excise required by the State, Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid. Oct. 17, 1940, c. 888, § 514, as added Oct. 6, 1942, c. 581, § 17, 56 Stat. 777, and amended July 3, 1944, c. 397, § 1, 58 Stat. 722."

It is to be noted from the foregoing statute that, if a person is living in the State of Alabama **solely by reason of complying with military orders,** he does not acquire a residence in Alabama for the purposes of taxation, nor does he lose his residence or domicile in another state for the purposes of taxation. Cf. Title 17, Section 17, Code of Alabama 1940. According to the provisions of Section 574, supra, when a person is in Alabama solely by reason of complying with military orders, the personal property that he owns or brings with him is, by Act of Congress, not in the State of Alabama so far as a personal property tax is concerned. This Act of Congress, Section 574, supra, has been upheld by the Supreme Court of the United States. **Dameron v. Brodhead,** 345 U. S. 322, 97 L. Ed. 1041, 73 S. Ct. 721, 32 A. L. R. 2d 612. In the **Dameron** case, supra, it was held that an officer of the Air Force assigned to duty near Denver, Colorado, and who was a resident of the State of Louisiana, could not be required to pay a property tax on his household goods located in Denver. In the **Dameron** case, the effect of the statute is stated in this simple manner:

"For this statute merely states that the taxable domicile of servicemen shall not be changed by military assignments. This, we think is within the Federal power."

I see no difference between the Alabama ad valorem tax on motor vehicles and the Alabama ad valorem tax on other personal property. It is my opinion, therefore, that by reason of Section 574, supra, Alabama cannot levy and collect an ad valorem tax on a motor vehicle owned by a person in Alabama, **living therein solely in compliance with military orders.** When such facts appear to the tax assessor he may, in my opinion, issue a certificate to the person, stating that no ad valorem tax is due on said vehicle. Such person may then pay the license or registration fee to the probate judge as required by Section 693, as amended, supra, and Act No. 315, supra, and receive his Alabama license tag.

The opinion above referred to (Vol. 64, page 53) held that persons owning automobiles and living in Alabama solely by reason of complying with military orders, had an election either to obtain license tags from the state of their domicile or to obtain Alabama license tags. Said opinion further held that if such persons elected to obtain Alabama tags, they must comply with the condition precedent, namely, the payment of Alabama ad valorem tax on the vehicle. I am of the opinion that this holding is in part erroneous. The proviso contained at the conclusion of Section 574, supra, merely allows a person living in Alabama solely by reason of complying with military orders to pay the license or registration fee in the state of his domicile and use an out of state tag in Alabama, instead of paying the Alabama license or registration fee in order to obtain an Alabama tag.

Insofar as the opinion of this office under date of September 29, 1951 (Vol. 64, page 53), and the letters to the Tax Assessor of Montogmery County and to the Commanding General of Redstone Arsenal, supra, conflict with the above opinion, said opinions are overruled. The opinion of this office rendered under date of November 9, 1948 (Vol. 53, page 59), is hereby reinstated and affirmed.

In order to avoid difficulties, it is suggested that persons, living in Alabama solely by reason of complying with military orders, and desiring to obtain an Alabama automobile license tag, should present to the tax assessor of the county in Alabama where said person is living proof that he is living in Alabama solely by reason of complying with military orders. The tax assessor, in my opinion, may accept the person's verbal statement to that effect, or the tax assessor may, if he so desires, require the person to sign an affidavit to that effect. If the tax assessor is convinced that the statement is true, he may then issue such person a certificate to the effect that no ad valorem tax is due. Such certificate may then be taken to the probate judge and said person may obtain an Alabama license tag upon the payment of the license or registration fee.

Very truly yours,

JOHN PATTERSON
Attorney General

October 31, 1955

Hon. Charles C. McWhorter
Chairman, Board of Revenue
Lawrence County
Moulton, Alabama

Judges of Probate—Poll Tax and Poll Lists—Elections—Voters—Counties—Claims—Limitation of Actions.

1. The judge of probate must furnish a list of qualified electors for each voting place to the election inspectors at each election.

2. The judge of probate is authorized to employ assistants and clerical help to prepare such lists for each election.

3. The assistants and clerical help employed to prepare such lists are to be paid for their services in the manner and at the rate prescribed by Title 17, Section 55, Code of Alabama 1940, as amended by Act No. 385, General and Local Acts 1951, page 677.

4. The assistants and clerical help employed to prepare one such list may not be paid in excess of their statutory compensation, even though they may prepare sufficient copies of such list for use in more than one election.

5. If a valid claim for preparing such lists is presented to the county governing body for allowance within twelve months after said claim accrues, it must be allowed and paid.

6. If a valid claim for preparing such lists is presented to the county governing body for allowance more than twelve months after said claim accrues, it may be allowed and paid at the discretion of the county governing body.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion bearing date of September 30, 1955, is as follows:

"Under date of September 7, 1955, three claims were presented to the Lawrence County Board of Revenue against the General Fund by Edith Johnson and Martha J. McCarty, clerks in the office of the Lawrence County Judge of Probate, reciting, in part, as follows:

" 'To payment of making Poll List 9,151 names 5c per name, Constitutional Amendment Election Nov. 2, 1954——$459.05. (See Quarterly Report of the Attorney General of Alabama, Volume 66-Opinion rendered K. J. Griffith, Judge of Probate, Cullman, Alabama.)'

" 'To payment of making Poll List 6,144 names at 5c per name, Constitutional Amendment Election May 6, 1952—$307.20. (See Quarterly Report of the Attorney General of Alabama, Vol. 66.)

"'To payment of making Poll List 6,144 names 5c per name, Constitutional Amendment Election Nov. 4, 1952.—$307.20. (See Quarterly Report of Attorney General of Alabama, Vol. 66)'

"There was attached to the claims a letter addressed to the undersigned which states, in part, as follows:

"'Although the two claims filed for making poll lists for the two Constitutional Amendment Elections held in 1952 is apparently barred by Section 118 of Title 12 Code of Alabama 1940, we are of the opinion that the Board of Revenue can still pay these claims under Title 12 of Section 110 of the Code of Alabama, 1940. Claim filed for the Constitutional Amendment Election held in November 1954 is still within the time required for filing such claims.'

"Please give me your opinion as to whether or not these claims can be legally paid at this time."

Your request presents two questions for consideration. The first may be stated as follows: Without considering Title 12, Section 118, Code of Alabama 1940, are the three claims for preparing poll lists valid?

It is well settled that the judge of probate must furnish the election inspectors at each voting place in each election with a list of qualified electors for such voting place. Quarterly Reports of Attorney General, Vol. 77, page 40; Vol. 74, page 84; and Vol. 66, page 88.

By virtue of Title 17, Section 55, Code of Alabama 1940, as amended by Act No. 385, General and Local Acts 1951, page 677, the judge of probate may employ assistants and clerical help to prepare the lists of qualified electors needed for each election and such assistants and clerical help are entitled to compensation for their services in an amount fixed by the judge of probate not to exceed an amount determined by multiplying the number of names on the lists by five cents. Quarterly Reports of Attorney General, Vol. 77, page 40; Vol. 75, page 34; and Vol. 74, page 84.

This office held in the opinion reported in Quarterly Report of Attorney General, Vol. 75, page 34, supra, that the assistants and clerical help employed by the judge of probate to prepare the lists needed in one election may not be paid in excess of their statutory compensation, even though they may prepare sufficient copies of said lists for use in more than one election.

Therefore, in answer to the first question presented by your request, I am of the opinion that you should use the above rules to determine the validity of the three claims without regard to Section 118, supra. If you determine under these rules that the claimants were employed by the judge of probate to prepare the lists described above for each election here under

consideration, that they did prepare such lists for each of said elections, and that their compensation for preparing said lists was fixed by the judge of probate in an amount not exceeding the limit placed thereon by Section 55, as amended, supra, then these claims are valid under said rules.

If said claims are determined to be valid in the manner described above, the claim for preparing said lists for the election held on November 2, 1954, must be paid, since said claim was presented for allowance within twelve months after the time it accrued.

The second question presented by your request must be answered in order to determine whether the claims for preparing the lists for the elections held on May 6, 1952, and November 4, 1952, may be paid. This question may be stated as follows: Assuming that said claims are valid, may they be paid in view of Section 118, supra?

The claims for preparing said lists for the elections held on May 6, 1952, and November 4, 1952, were not presented for allowance within twelve months after the time they accrued.

Section 118, supra, reads as follows:

"All claims against counties must be presented for allowance within twelve months after the time they accrue, or become payable, or the same are barred, unless it be a claim due to a minor, or to a lunatic, who may present such claim within twelve months after the removal of such disability."

Title 12, Section 110, Code of Alabama 1940, reads as follows:

"The court of county commissioners, board of revenue, or other governing body of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall determine from time to time for the following purposes: First, to reimburse any person, firm or corporation, who in good faith has performed service, advanced money, or property for the use of the county, or who has in good faith bought county warrants issued under invalid acts of the legislature for tick eradications or for building public roads. Second, to refund to any person, firm or corporation, money, or compensate him or it for services rendered or money or property advanced and devoted to the use of the county, in procuring funds for carrying on road improvement, tick eradication, or any lawful public work, where, after the advancement of such money, or property, or the rendition of such service, it was declared by decision of the supreme court, or by the decision of the attorney-general that the county was without authority to pay such claims, on account of a defect in any law or any other reason."

It was held in the opinion reported in Quarterly Report of Attorney General, Vol. 76, page 85, that even though a claim against the county may be barred for failure to present it to be audited and allowed within one

year as required by Section 118, supra, it may be allowed and paid at the discretion of the county governing body under the authority of Section 110, supra, if the county has actually received the services upon which the claim is based.

Therefore, assuming that the claims for preparing the poll lists for the election held on May 6, 1952, and November 4, 1952, are otherwise valid, I am of the opinion that your Board of Revenue may allow and pay said claims.

Very truly yours,

JOHN PATTERSON
Attorney General

October 31, 1955

Honorable Leslie L. Gwaltney, Jr.
Superintendent of Insurance
CAPITOL

Appropriations—Statutes—Insurance—Fire Marshal.

Expenditure of funds appropriated for the State Fire College under Act No. 373, General Acts 1955 (Ms.), approved September 8, 1955, is not authorized for the purpose of employing instructor personnel.

Opinion by Assistant Attorney General Sanders.

Dear Sir:

Your request for an official opinion, bearing date of October 24, 1955, is as follows:

"You will find attached hereto and made a part of this request for opinion, House Bill 166, Enrolled, An Act, To create and establish a State Fire College to provide for an Advisory Committee, an annual training session, and appropriations for carrying out the provisions of the Act.

"Under Section 4 of this Act, 'There is hereby appropriated, out of any funds in the State Treasury, not otherwise appropriated, the sum of forty thousand dollars ($40,000.00) to be used to purchase necessary training equipment, materials and supplies, as approved by the Advisory Committee and the State Superintendent of Insurance, such purchases to be made by the Purchasing Agent of the State of Alabama'.

"Certain out-of-state instructors are employed by the State Fire College to instruct training in modern methods of fire fighting, fire prevention, and modern methods for the preservation of life and property, etc.

"It will take approximately $1,500.00 to pay certain employed instructors and clerical personnel in conducting the State Fire College, and your opinion is requested as to whether or not the $1,500.00 may be used out of the $40,000.00 for this purpose.

"Your opinion is requested as to whether or not it was the intent of the legislature to include the cost of instruction in the $40,000.00 due to the fact the instruction is necessary in the use of the training equipment and materials used in the various courses taught at the State Fire College.

"Your opinion is requested as to whether or not the Superintendent of Insurance would have the authority to request the State Budget Officer to set aside the $1,500.00 for this purpose and the cost of the instruction paid by the Department of Insurance with the approval of the Department of Finance.

"It would appear that the training equipment, material and other things to be used in the course of instruction at the State Fire College would be of no value unless the cost of instruction is intended as a part of the appropriation.

"Your opinion is requested as rapidly as possible, as the State Fire College is now being set up for instruction to commence as soon as the funds are available to pay the instructors to be used during the fall term of the State Fire College."

My answer to all of your questions is in the negative..

The Act to which you refer (Act No. 373, General Acts 1955 (Ms.), approved September 8, 1955) creates the State Fire College under the administration of the Superintendent of Insurance. The Act makes no specific provision for instructor personnel, however, beyond making it the duty of an Advisory Committee "to assist in finding and recommending" such personnel. Furthermore, the Act makes no appropriation of funds for administering the Act except the one in Section 4 which you have quoted above. As can readily be seen from the language of that section, the appropriation of $40,000 is for the purchase of "necessary training equipment, materials, and supplies." Under no circumstances could this be construed as authorizing the expenditure of a portion of this amount for the purpose of compensating instructor personnel, by way of fees, salary, or reimbursement of expenses for their services.

It is necessary only to call your attention to Title 55, Section 106, Code of Alabama 1940, which provides, in part, that "It shall be unlawful for any trustee, commissioner, director, manager, building committee, or other officer or person connected with any department, institution, bureau, board, commission or other state agency, to which an appropriation is made, to expend any appropriation for any purpose other than that for which the money was appropriated, budgeted and allotted, or to consent thereto." In view of the mandate of this section and the plain language of Act No. 373, supra, it is apparent that an expeniture for the purpose suggested would be unlawful.

Nor can the obvious intent of the Legislature in providing for the instruction of firemen be assumed to include an intent to employ paid instructors, in the absence of any provision to that effect. The language of a statute can be departed from only where there is ambiguity or where adherence to the strict letter of the law would lead to injustice or absurdity. Neither of these situations can be said to be present here.

Nothing said herein, however, is to be construed as precluding any instruction or demonstration of equipment which is furnished free of charge by the makers or sellers of such equipment.

Very truly yours,

JOHN PATTERSON
Attorney General

October 31, 1955.

Hon. Reo Kirkland,
Judge of Probate,
Escambia County,
Brewton, Alabama.

Elections—Counties—Escambia County—Constitutional Amendments.

1. (a) An election by Escambia County, under the provisions of Title 12, Sections 92-109, Code of Alabama 1940, to decide whether or not the bonds of the county shall be issued for the purpose of building a jail may be validly held on the same day as the election on proposed constitutional amendments, and may be conducted by the same election officials, who must, however, be separately appointed for each election.

(b) The election officials referred to above may receive pay, however, for their services as to one election only and as provided by Title 17, Section 198, Code of Alabama 1940, as last amended by Act No. 127, General Acts 1947, page 38.

2. Where a county holds two elections on the same day, one on proposed constitutional amendments affecting the State as a whole, and other amendments affecting specfically other counties, the other relating to a county bond issue for the purpose of building a jail, the county is reimbursed by the State for all expenses as defined in Act No. 160, General Acts 1955 (Ms.), effective July 28, 1955, relating to the amendments, including pay for election officials, and the county holding the bond issue election pays all other expenses, including those relating to the bond issue.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of October 21, 1955, is as follows:

"I would appreciate your official ruling on the following questions:

"The County Board of Revenue has voted to hold a County Bond Election under Title 12 Section 92-109, of the Code of 1940 as amended for building of a jail.

"Can such bond election be held by the same County election officers to be appointed for holding the State and County Election on December 6th or 13th on the Amendments to the Constitution of Alabama or under what statute or ruling can it be done?

"Would the holding of this election on the same date injure or destroy the County Bond Election?

"If your ruling is that it **can** be held along with the Constitutional Election of Dec. 6th or the 13th and under the new Legislative Act concerning expenses of County and State elections, how would the cost be taxed in this specific instance as to the election expense?"

Election officers occupy a public office created by law, whose powers and duties are prescribed by law, which also provides for the manner of their appointment. **Ex Parte Register,** 257 Ala. 408,, 60 So. 2d 41.

Under the provisions of Title 12, Section 96, Code of Alabama 1940, the probate judge, the circuit clerk, and the sheriff appoint three managers, two clerks, and one returning officer for each beat or polling place in the county to conduct the election to decide whether or not bonds of the county shall be issued for the purpose of building a jail.

These election officials are paid under the provisions of Section 97, Title 12, Code of Alabama 1940, out of the county treasury, and are paid the same compensation as officers of the general election.

The same county officers, namely, the probate judge, the circuit clerk, and the sheriff, appoint three inspectors, two clerks, and a returning officer for each precinct as election officials for voting on constitutional amendments. **Title 12, Section 120, Code of Alabama 1940; Quarterly Report** of Attorney General, Vol. 56, page 12. It is provided by Section 198, Title 17, Code of Alabama 1940, as last amended by Act No. 127, General Acts 1947, page 38, that the pay of said election officials shall be as follows:

> "The returning officer and the inspectors and clerks shall each be entitled to five dollars, and the returning officer, in addition, to five cents a mile in going to the courthouse and returning to the place of holding the election; the several claims shall be paid as preferred claims, out of moneys in the county treasury not otherwise appropriated, on proper proof of service rendered."

It is well settled that an officer, or the one performing the duties of the office, shall receive as compensation for his services only such amount as provided by statute. Biennial Report of Attorney General, 1926-28, page 144.

It is to be here noted that Section 198, as amended, supra, does not provide $5.00 for each election, nor does it provide $5.00 for each day of service.

In an opinion of this office reported in Quarterly Report of Attorney General, Vol. 18, page 297, it was held that the returning officer is not entitled to two days pay although he performed services in connection with his duties on two successive days.

This office has also held that where election officials appointed to conduct a general election also conduct an election on proposed constitutional amendments held on the same day, they are entitled to only the compensation for the holding of one election. Quarterly Report of Attorney General, Vol. 20, page 241.

To the same effect is an opinion reported in Biennial Report of Attorney General, 1924-26, page 370, relating to the compensation of election officials holding on the same day a primary election and a special election for members of the Legislature. It was there said:

> " . . . It is not the legislative intent to compensate for two separate services performed at the same time as indicated by the prohibition of holding two public offices of profit at the same time by the same person. As a matter of fact, officers holding two elections at the same time are performing but one duty, i. e., that of supervising the balloting in two boxes at the same place, alternating their attention between the two."

This office has also held that where there was a general election, a special election for United States senator, and an election on several proposed amendments to the Constitution, all on the same day, the same officials could hold all three elections, but a separate poll list, tally sheet, ballot box.

etc., must be furnished and used for each election. Biennial Report of Attorney General, 1920-22, page 6. See also Biennial Report of Attorney General, 1930-32, page 813; Quarterly Report of Attorney General, Vol. 48, page 106; Vol. 66, page 88; Vol. 77, page 40.

Section 284, Constitution of Alabama 1901, as amended by Amendment XXIV, relating to constitutional amendments, provides in pertinent part as follows:

> " . . .If such election be held on the day of the general election, the officers of such general election shall open a poll for the vote of the qualified electors upon the proposed amendments; if it be held on a day other than that of the general election, officers for such election shall be appointed; and the election shall be held in all things in accordance with the law governing general elections. . . ."

It is my opinion, therefore, from what has been said above, that the bond election referred to in your request may be held by the same county election officials to be appointed for holding the election on the proposed constitutional amendments. They are, however, separate elections and the officers should be separately appointed for each election.

The elections on the proposed constitutional amendments and on the bond issue for the purpose of raising revenue to build a jail may be legally held on the same day without affecting the validity of the bonds to be issued as a result of the bond election.

By Act No. 160, General Acts 1955 (Ms.), effective July 28, 1955, the State of Alabama is required to reimburse a county for one-half of all sums expended by the county in payment of expenses, as defined in said Act, incurred in holding and conducting an election at which both amendments to the Constitution affecting one or more counties, or subdivisions thereof, and amendments affecting the State of Alabama as a whole are voted upon.

If the election is one at which only amendments to the Constitution of Alabama affecting the State as a whole are voted upon, the State reimburses the county in full for all expenses, as defined in Act No. 160, supra, which include the compensation of the election officials.

It is my understanding that there are no proposed constitutional amendments pertaining to Escambia County alone, or to one or more counties, or subdivisions thereof, including Escambia County, as distinguished from the State as a whole, which are to be voted upon at the coming election referred to in your request. Based on this assumption, the State of Alabama would reimburse Escambia County for all of the expenses, as defined by Act No. 160, supra, incurred by it relative to holding the election on the proposed constitutional amendments. This would include the pay of the election officials.

Escambia County would pay all other election expenses and those relative to the proposed bond issue for the purpose of securing funds to build a jail, which would not include the pay of the election officials, due to the fact that I have hereinabove ruled that they can receive pay for only one of the elections.

This opinion is to be distinguished from the one reported in Quarterly Report of Attorney General, Vol. 65, page 14, relative to the register receiving pay for each election held on the same day (other than municipal elections held at a time different from a primary or general election) in the performance of his duties in handling absentee ballots. There the statute under consideration provided pay for his services during the twenty days prior to each election. Here there is no such similar provision.

Yours very truly,

JOHN PATTERSON,
Attorney General

November 3, 1955.

Hon. Chester Walker
Judge of Probate
Tuscaloosa County
Tuscaloosa, Alabama

Gasoline and Gasoline Tax—Refunds—Tractors.

An arrangement to farm on shares, whereby the landowner furnishes the land and the tractor and tractor fuel with which the land is to be cultivated, and receives one-third of the cotton and one-fourth of the corn, and the alleged tenant furnishes the labor and necessary materials and receives the remainder of the crop, comes within the requirements of Section 7 of Act No. 323, General and Local Acts 1949, page 469, and the landowner is entitled to the appropriate gasoline tax refund.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of September 23, 1955, is as follows:

"I enclose you herewith refund instructions to all permit holders of farm tractor gas exemption certificates. I have been requested to ask for

an Attorney General interpretation of the paragraph relating to gasoline subject to refund, which reads as follows:

" 'Refund gasoline is gasoline purchased in quantities of fifty (50) gallons or more at any time, either at wholesale or retail when delivery is taken in full and used in a tractor for agricultural purposes on a farm or farms, owned, leased or operated by the claimant. It must also be stored in a container which is under the complete control of the permit holder and cannot be placed in a retail tank or mixed with gasoline which is or will be offered for resale. **Each purchase must be evidenced by a purchase invoice.**

"Mr. Blank owns a farm. He has tenants working as sharecroppers on certain parts of his farm on thirds and fourths.

"Mr. Blank owns a farm tractor. He uses it in cultivating the land rented to his tenants on thirds and fourths. Mr. Blank applies for refund tax on gasoline used in his tractor while cultivating land rented to tenants as stated above.

"Is Mr. Blank entitled to refund under law governing gasoline tax refund to farmers on farms owned, leased or operated by claimant?"

From what you state in your request, it appears that on a part of his farm a certain landowner has an alleged tenant working under an agreement whereby the landowner furnishes the land and the tractor and tractor fuel with which the land is to be cultivated, and the alleged tenant contributes the labor and materials which are necessary to raise the crops; that, when the crops are harvested, the landowner will take as his part one-third of the cotton and one-fourth of the corn, and the alleged tenant will take the remainder. These so-called "share crop" arrangements vary, of course, in different cases, but, from what you say, the foregoing appears to be the facts in this particular case.

Your question, then, would be governed more by the law itself than by the instructions or regulations which have been promulgated by the Department of Revenue (a copy of which instructions you have attached), as the refund law appears to deal directly with such a situation. The applicable part of the State gasoline tax refund law relating to the operation of farm tractors is found in Section 7 of Act No. 323, General and Local Acts 1949, page 469, which section reads as follows:

"Claims for tax refunds must be filed with the commissioner of revenue, on forms to be prescribed by him, within six months from the date of purchase of the gasoline with respect to which the claim is made. Every claim shall be verified by the oath of the claimant and be supported by invoices of refund gasoline purchased. **No refund shall be made unless the commissioner is satisfied that the gasoline with respect to which the refund is claimed was used in a tractor, or tractors, used exclusively in**

plowing, planting, harvesting, or processing agricultural products on a farm, or farms, owned, leased, or operated by the person making such claim. Upon approval of a claim, the state comptroller is authorized and directed to draw a warrant for payment. There is appropriated of the proceeds of the state tax on gasoline so much thereof as may be necessary to make, from time to time, refunds as provided for in this article." (Emphasis added.)

Under the emphasized portion of Section 7 of Act No. 323, supra, quoted above, for a person to be eligible for a refund under the Act is the requirement, among others, that the tractor or tractors involved be "used exclusively in plowing, planting, harvesting, or processing agricultural products on a farm, or farms, **owned, leased, or operated by the person making such claim.**" (Emphasis added.) It is, therefore, apparent that whether or not a person is eligible for a refund of the appropriate tax on the gasoline used in his tractor or tractors to cultivate the farm would depend upon the facts presented in each case.

This being considered in relation to the facts which have been presented in your request, I am of the opinion that the arrangement which you speak of comes within the requirements of Section 7 of Act No. 323, supra, and the landowner could qualify for the six cents per gallon refund as to the tax paid on the gasoline used in his tractor.

Yours very truly,

JOHN PATTERSON,
Attorney General.

November 7, 1955

Hon. Wilkes C. Robinson, Judge
Juvenile & Domestic Relations Court
Calhoun County
Anniston, Alabama

Officers and Offices—Municipalities—Legislature.

1. A member of the Alabama Legislature holds an office of profit within the meaning of Section 280 of the Constitution of Alabama 1901 and Title 41, Section 5, Subsection 7, Code of Alabama 1940.

2. A member of a city water board does not hold an office of profit within the meaning of Section 280 of the Constitution of Alabama 1901 and Title 41, Section 5, Subsection 7, Code of Alabama 1940.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion bearing date of October 4, 1955, is as follows:

"1. Does the appointment of a person for membership on a City Water Board in the City of Heflin, Alabama at a fixed compensation of $10.00 per month and for a fixed term, violate the Constitutional prohibition against holding two offices of profit when said person is later elected to a seat in the State legislature and begins serving this second office?

"2. Does the assumption of the duties by said person of the second office as a legislator automatically vacate that person's position or membership on the said Water Board?"

The applicable sections of the Constitution and the statutes are section 280 of the Constitution of 1901, and Title 41, Section 5, subsection 7, Code of Alabama 1940, which provide respectively:

"Sec. 280. No person holding an office of profit under the United States, except postmasters, whose annual salaries do not exceed two hundred dollars, shall, during his continuance in such office, hold any office of profit under this state; nor, unless otherwise provided in this constitution, shall any person hold two offices of profit at one and the same time under this state, except justices of the peace, constables, notaries public, and commissioner of deeds."

"7. No person holding an office of profit under the United States, shall, during his continuance in such office, hold any office of profit under this state; nor shall any person hold two offices of profit at one and the same time under this state, except notaries public."

In order to answer your first inquiry, it is necessary to determine whether or not a member of the Alabama Legislature holds an office of profit and whether or not a member of a city water board holds an office of profit within the meaning of the above constitutional provision and the above statutory provision. In considering first whether or not a member of the Alabama Legislature holds such an office of profit, it appears that both the Supreme Court of Alabama and the opinions of this office have answered this question in the affirmative. A state, county, or municipal office, whether elective or appointive, carrying as a necessary incident to its exercise, some part of the sovereign power of the State, is an office of profit under this State, within the meaning and purview of the above constitutional and statutory provisions. State ex rel. Glenn v. Wilkinson, 220 Ala. 172, 124 So. 211; State v. Sanders, 187 Ala. 79, 65 So. 378. Unquestionably, a legislator, in carrying out

his duties and responsibilities as a lawmaker, exercises some part of the sovereign power of the State.

In Biennial Report of Attorney General, 1928-1930, page 636, the opinion was rendered that a member of the Legislature of Alabama is an officer of profit under Section 280, supra. It would, therefore, appear to be clearly established that a member of the Legislature holds an office of profit within the meaning of the said constitutional provision and statute. **Opinion of the Justices,** 244 Ala. 386, 13 So. 2d 674.

With regard to the membership on the City Water Board, I am assuming that the person, to whom you refer, is one of the directors of a corporation organized pursuant to Title 37, Section 394, et seq., Code of Alabama 1940, as amended by Act No. 572, General Acts 1943, page 575, and Act No. 686, General and Local Acts 1949, page 1057. The legal status of such a member or director of a water works board, with respect to the above constitutional and statutory provisions, is less clearly defined than that of a memeber of the Legislature. However, the standards used in defining an "office of profit" in the cases of **State v. Sanders,** supra, and **State ex rel. Glenn v. Wilkinson,** supra, should be applied to this position also. In addition, consideration should be given to the holding of **In re Opinion of the Justices,** 254 Ala. 158, 47 So. 2d 591, in which the Court said:

> "We will not undertake here to give a comprehensive definition of an office of profit within the meaning of §280 of the Constitution or of an officer, nor will we review all of our decisions as they bear upon these subjects. Suffice it to say that in legal parlance probably few words have a greater variety of meaning or shades of meaning than the words 'office' and 'officer.' On account of this variety of meaning attaching to the words 'office' and 'officer' as used in various statutes and constitutional provisions, the adjudicated cases do not always, or even often, furnish safe guides by which to determine with absolute certainty whether or not a given employment is an office within the meaning of the statutes and constitutional provisions. **Every case must of necessity be determined by consideration of the particular facts and circumstances involved."** (Emphasis supplied.)

Although this office has held in Quarterly Report of Attorney General, Vol. 14, page 166, that a water works board is a municipal agency, members of such a board would not necessarily be state officers or holders of offices of profit, within the meaning of the above constitutional and statutory provisions. In determining this question, consideration must be given to their functions, duties, and responsibilities. A water works board is a corporate entity set up pursuant to specific statutes and the corporation has only such power and authority as is granted to it by statute, which power is limited in nature, and the members or directors of the board would similarly exercise limited authority.

In Quarterly Report of Attorney General, Vol. 54, page 41, it was held that to constitute the holding of an office of profit within the meaning of

Section 280, supra, one must hold a public office carrying with it the exercise of a part of the sovereign power of the State, the salary, fees, or other compensation of which are fixed by law. See, also **Opinion of the Justices,** supra.

It appears that the members or directors of the Water Works Board here have not been invested with any portion of the sovereign power of the State in the exercise of their duties. See **Robbins v. City of Sheffield,** 237 Ala. 674, 188 So. 874.

It is, therefore, my opinion, in view of the above considerations, that a member of the Water Works Board does not hold an "office of profit" as contemplated in the above constitutional and statutory provisions. Thus, my answer to your first inquiry is in the negative.

In view of the opinion which I have expressed in answering your first inquiry, it is unnecessary to answer your second inqury.

Very truly yours,

JOHN PATTERSON,
Attorney General

November 10, 1955

Hon. C. R. Lawson
Tax Assessor
Hale County
Greensboro, Alabama

Motor Vehicles—Licenses—Taxation—Military and Naval Affairs—Soldiers' and Sailors' Civil Relief Act—United States—Ad Valorem Taxes—Tax Assessors—Automobiles.

Liability of both resident and nonresident military personnel for payment of ad valorem tax on motor vehicles discussed generally.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of October 31, 1955, is as follows:

"I would appreciate very much an official opinion from your office regarding military personnel that are residents of the State of Alabama

and are now for military reasons stationed outside of the State. Are these soldiers subject to our automobile ad valorem tax when they come home to purchase their tags?

"I have had several soldiers to come to my office and demand an exemption of ad valorem tax stating that due to their being a soldier they were not subject to the automobile ad valorem tax. I have refused to allow them an exemption and in a number of cases the applicant has gone to a neighboring County and purchased their tag tax free. Please let me know at your earliest convenience if they are subject to this tax."

In my opinion, residents of the State of Alabama, who are stationed outside of the State of Alabama solely by reason of military orders, are not entitled to obtain an Alabama automobile license tag without the payment of ad valorem tax.

This office has recently issued an opinion holding that nonresident servicemen who are stationed in Alabama and who are in Alabama solely by reason of complying with military orders, and owning automobiles, are not subject to the Alabama ad valorem tax when obtaining a license tag for said automobile by reason of the Soldiers' and Sailors' Civil Relief Act (Title 50, U. S. C. A., Section 574). See opinion of the Attorney General under date of October 27, 1955, addressed to Lt. Col. Donald V. Gassie, Staff Judge Advocate, Headquarters, The Army Aviation Center, Camp Rucker, Alabama.

When a resident of Alabama becomes a member of the military service, and is stationed outside of Alabama, he does not thereby lose his residence or domicile in Alabama. Title 50, U. S. C. A., Section 574. If he owns an automobile, he is entitled to obtain an Alabama license tag for the privilege of operating an automobile on the public highways of Alabama. Title 51, Section 693, Code of Alabama 1940, as amended by Act No. 206, General and Local Acts 1951, page 468. If such automobile is designed and used primarily for passenger purposes, the amount of the license tax is fixed at three dollars by Act No. 315, General and Local Acts 1951, page 610.

Before paying his license tax referred to above, Title 51, Section 704, Code of Alabama 1940, as amended by Act No. 314, General Acts 1945, page 504, requires the payment in the county of his residence ad valorem tax for the "preceding year." Section 704, as amended, supra, provides in subsection (c) thereof that "motor vehicles brought into this state after the first day of October and before the tax assessor has completed his assessment shall be subject to taxation the same as if it had been held or owned in the state on the first day of October." Therefore, if an automobile was in the State of Alabama on October 1, 1954, or brought into Alabama before the tax assessor has completed his assessment (the last Monday in February, 1955—Title 51, Section 57, Code of Alabama 1940), there would normally be due and payable on October 1, 1955, ad valorem tax. Section 704, as amended, supra.

It is to be presumed that personal property, including automobiles, has situs, or is located at the place of residence of the owner.

However, it is stated in your inquiry that this person who is a resident of Alabama is stationed outside of the State of Alabama, and I assume that he has his car with him outside of the State of Alabama. I further assume that the car has either never been in the State of Alabama or that, if brought within the geographical boundaries of this State, its presence was of a temporary nature, perhaps during a period of leave or furlough. I further assume that the actual location and normal location of this automobile on October 1, 1954, was at this person's quarters, wherever he may be stationed outside of the State of Alabama.

Section 211 of the Constitution of Alabama 1901 provides in part as follows:

"All taxes levied on property **in this state** shall be assessed in exact proportion to the value of such property . . ." (Emphasis supplied.)

Section 214 of the Constitution of Alabama 1901 provides as follows:

"The legislature shall not have the power to levy in any one year a greater rate of taxation than sixty-five one-hundredths of one per centum on the value of the taxable property **within this state.**" (Emphasis supplied.)

Section 215 of the Constitution of Alabama 1901 provides in part that:

"No county in this state shall be authorized to levy a greater rate of taxation in any one year on the value of the taxable property **therein** than one-half of one per centum; . . ." (Emphasis supplied.)

Section 216 of the Constitution of Alabama 1901 provides in part:

"No city, town, village, or other municipal corporation, other than as provided in this article, shall levy or collect a higher rate of taxation in any one year on the property **situated therein** than one-half of one per centum of the value of such property as assessed for state taxation during the preceding year; . . ." (Emphasis supplied.)

The Supreme Court of Alabama has held that the phrase "situated therein" means situated within the geographical boundaries thereof. **Tennessee Coal, Iron & R. Co. v. State,** 239 Ala. 19, 193 So. 143. See also **Pure Oil Company v. State,** 241 Ala. 139, 1 So. 2d 648. Said cases, however, are not concerned with the provisions of the Soldiers' and Sailors' Civil Relief Act (Title 50, U. S. C. A., Section 574).

The above cited cases hold that personal property is taxable in the tax district wherein the property is physically located and not necessarily at the residence of the owner thereof. It is held in those cases that the

property may be taxed at its situs and may not be taxed according to its value unless the property has situs within the geographical boundaries of the taxing authorities. This seems to be the uniform rule concerning tangible personal property. **Union Refrigerator Trainsit Company v. Kentucky** (1905), 199 U. S. 194, 50 L. Ed. 150, 26 S. Ct. 36, 4 Ann. Cas. 493; 123 A.L.R. 182; 51 Am. Juris., Taxation, Section 457, page 470.

The Soldiers' and Sailors' Civil Relief Act (Section 574, supra) provides, however, that "for the purposes of taxation in respect of any person, or of his personal property, . . . by any State, Territory, possession, or political subdivision. . . such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision. . . solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision. . . while, and solely by reason of being so absent . . ."

It appears to me, therefore, that the person referred to in your inquiry, a resident of the State of Alabama, serving in the Armed Forces and stationed outside of the State of Alabama on October 1, 1954, and owning an automobile, is deemed to be a resident of Alabama on that date, and his personal property, consisting of an automobile, is deemed to be located within Alabama. Therefore, such person must pay his ad valorem tax on said vehicle due and payable October 1, 1955, before obtaining a license tag in Alabama.

What has been stated above applies to both State and county ad valorem taxes. However, tax assessors and tax collectors also assess and collect municipal ad valorem tax due the cities in the State. Subsection (d) of Section 704, as amended, supra. Ad valorem taxes due to municipalities on October 1, 1955, are assessed and collected in reference to October 1, 1955, and not October 1, 1954, the date heretofore discussed in connection with State and county ad valorem taxes. **Johnson v. State,** 245 Ala. 499, 17 So. 2d. 662. Montgomery, Alabama, is an exception to this rule and ad valorem taxes are collected here on the same basis as State and county taxes. See **City of Montgomery v. Graham, et al.,** 255 Ala. 685, 53 So. 2d 363. Therefore, the situs of the automobile as of October 1, 1955, should be used to determine whether or not municipal ad valorem tax is due and payable on said vehicle on October 1, 1955. Although on that date, October 1, 1955, the person referred to in your inquiry is still stationed outside of the State of Alabama and keeps his car with him outside this State, he would owe ad valorem tax to a municipality if his Alabama residence is situated in a municipality.

I also have several inquiries from other tax assessors in the State of Alabama concerning the opinion of this office rendered under date of October 27, 1955, and addressed to Lt. Col. Donald V. Gassie, Staff Judge Advocate, Headquarters, The Army Aviation Center, Camp Rucker, Alabama, which held that nonresident military personnel, stationed in Alabama solely by reason of military orders and owning automobiles, were not required to

pay Alabama ad valorem tax when obtaining an Alabama license tag. It should further be stated that in respect to the State and county ad valorem taxes which are due and payable on October 1, 1955, the status of the owner and the location of the vehicle on October 1, 1954, is controlling. If a person is in Alabama on October 1, 1954, the law day for State and county ad valorem taxes due and payable on October 1, 1955, and at that time is in Alabama solely by reason of his military service, he does not owe the tax which would otherwise be due and payable on October 1, 1955. In respect to whether or not municipal ad valorem tax is due and payable on October 1, 1955, the status of the owner and the location of the automobile on October 1, 1955, is controlling, except for the City of Montgomery, Alabama. See **Johnson v. State,** supra; and **Montgomery v. Graham,** supra. Non-resident servicemen in Alabama on that date, October 1, 1955, for the purpose of complying with military orders, and owning automobiles; should not be required to pay municipal ad valorem tax due and payable October 1, 1955.

I am also asked: "If such person (nonresident military personnel, supra) buys a motor vehicle in Alabama on which the tax lien attached prior to such purchase, must he pay ad valorem taxes on such vehicle before purchasing a plate?"

With respect to Alabama State and county ad valorem taxes due and payable on automobiles on October 1, 1955, the lien attaches on the law day, October 1, 1954. Title 51, Section 884, Code of Alabama 1940, as amended by Act No. 692, General and Local Acts 1953, page 944. **United States v. Alabama,** 313 U. S. 274, 85 L. Ed. 1327, 61 S. Ct. 1011. The lien attaches for municipal taxes (except in Montgomery as hereinbefore noted) on the same day the tax is due and payable, October 1, 1955.

If a nonresident serviceman purchases an automobile on or after October 1, 1954, the lien for State and county ad valorem taxes due and payable October 1, 1955, has already attached and the question arises as to whether or not the Soldiers' and Sailors' Civil Relief Act (Section 574, supra) relieves the purchasing nonresident serviceman from paying ad valorem taxes on October 1, 1955. I am of the opinion that it does not.

Section 574, supra, was intended to relieve the non-resident serviceman of property taxes when he was out of his state of residence and owned personal property at the **time** that is fixed with respect to which persons and subjects of taxation shall be determined and values fixed or assessed. **Johnson v. State,** supra. As heretofore stated, this date or law day was October 1, 1954, for State and county ad valorem taxes due and payable October 1, 1955. Therefore, a nonresident serviceman purchasing an automomible after the lien has attached (on or after October 1, 1954) purchases subject to the lien for State and county ad valorem taxes. This lien accrued before the automobile was owned by a non-resident serviceman in Alabama and remains a charge on the vehicle until paid on October 1, 1955. Such vehicle was actually situated in Alabama on the law day and owned at that time by a person not protected by Section 574, supra. Therefore, such nonresident serviceman would owe the ad valorem tax on said

vehicle when purchasing an Alabama license plate on or after October 1, 1955. The same reasoning would apply to municipal ad valorem tax in Montgomery. **Montgomery v. Graham,** supra.

Under the same circumstances lien for municipal tax, other than Montgomery, attaches October 1, 1955. Therefore, in respect to said municipal tax due and payable October 1, 1955, if the purchase was made by the nonresident serviceman prior to October 1, 1955, he owns the automobile on the law day for municipal tax and would be protected from paying said municipal ad valorem tax on October 1, 1955. Further, if said purchase was after October 1, 1955, and the vendor had not obtained an Alabama tag for 1956, the municipal ad valorem tax, as well as State and county, must be paid by said non-resident serviceman before obtaining his 1956 plates before November 16, 1955.

I am also asked the following question: "If a non-resident serviceman brings a motor vehicle into the State prior to the last Monday in February 1955 (Febraury 28, 1955) and thereafter sells same to an Alabama resident, are ad valorem taxes due and payable on October 1, 1955?"

I am of the opinion that said vendee would not be required to pay State and county ad valorem taxes on said vehicle on October 1, 1955.

Section 704(c), as amended, supra, requires said automobile to be regarded as being in Alabama on October 1, 1954, and, therefore, subject to State and county ad valorem taxes due and payable October 1, 1955. But said vehicle was brought into Alabama by a nonresident serviceman who was entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act, Section 574, supra. Said act, in my opinion, would prevent the attaching of a lien on October 1, 1954, and, therefore, a purchase made by an Alabama resident after February 28, 1955, would not subject the vehicle to a tax lien for State and county taxes due and payable October 1, 1955.

However, if said vehicle is purchased by said Alabama resident on or before October 1, 1955, municipal tax would be due and payable on said vehicle on October 1, 1955 (except for Montgomery, as previously noted).

Very truly yours,

JOHN PATTERSON,
Attorney General

November 15, 1955

Hon. W. O. Brownfield
Register of Circuit Court
Lee County
Opelika, Alabama

Nonsupport—Registers—Costs and Fees—Pensions and Security, Department of—Solicitors.

1. The court may direct that all or any part of the costs and fees incurred in proceedings brought under Act No. 879, General and Local Acts 1951, page 1515, as amended by Act No. 823, General and Local Acts 1953, page 1107, shall be paid by the State.

2. The cost bills in such cases should be mailed to the State Comptroller.

3. Either security for costs or an affidavit of inability to pay the court cost as required by the responding state in such cases should be included in the transcript forwarded by the register to the responding state.

4. The Department of Pensions and Security has no legal duty to obtain from the petitioner security for costs or an affidavit of inability to pay court costs as may be required by the responding state.

Opinion by Assistant Attorney General Baker.

Dear Sir:

Your request for an official opinion bearing date of September 21, 1955, is as follows:

"Re: Uniform Reciprocal Support Act..

"We have spent quite a lot of time studying the above Act with little results. This is a new law and evidently has not been ruled on by the Attorney General's Office and some of the provisions are rather vague. We would like to go straight to begin with. We have quite a number of this kind of cases in this county and from other states to deal with.

"There are several points of the Act that we would like an opinion on. They are as follows:

"A: Are we allowed under the Amended Act, Title 34, Sec. 119(b) to charge for services outlined in this act according to services charged for in Equity as Register for docketing, mailing, etc?

"B: If the cost incurred in these cases is to be paid by the state, how do we go about collecting it?

"C: Is there any provision when we are confronted by some states refusing to make action in these cases unless they get Security for cost in advance? They either want their cost or a Pauper's Affidavit. Does the Alabama Law Provide for a Pauper's Affidavit?

"D. Shall we instruct the Welfare Department to secure from the Petitioners in these cases a Deposit for Cost or shall we instruct them to make a Pauper's Affidavit, if the law provides for it, when they bring the papers in for filing?"

It is my opinion that, where an action is brought under the Uniform Reciprocal Support Act (Act No. 879, General and Local Acts 1951, page 1515, as amended by Act No. 823, General and Local Acts 1953, page 1107), all or any part of the costs and fees incurred in this State may, at the discretion of the court, be taxed against the State. Act No. 879, as amended, supra; Opinion to Hon. Edward Reynolds, County Solicitor, Macon County, dated September 30, 1955.

Where the trial court has taxed all or any part of the costs and fees against the State in cases brought under Act No. 879, as amended, supra, the register prepares a cost bill in accordance with the order of the court. The cost bill should contain a certified copy of the order of the court sworn to by the register. This is mailed to the State Comptroller. Title 51, Section 893, Code of Alabama 1940, and Quarterly Report of Attorney General, Vol. 53, page 75.

Section 9 of Act No. 879, as amended, supra, provides that the court may direct the circuit solicitor, or other prosecuting attorney for the State, to represent the petitioner in proceedings brought under this Act. This section is concerned with methods of enforcing support. It would appear, therefore, particularly in cases in which the Petitioner is a needy person or is receiving subsistence from the State, that the court may direct the circuit solicitor, or other prosecuting attorney for the State, to represent the Petitioner after complaint has been made to the court. The solicitor would, therefore, file the necessary petition and other pleadings under the Uniform Reciprocal Support Act. It is my opinion that it is the duty of the circuit solicitor, or other prosecuting attorney for the State, when directed by the court to represent the Petitioner, to prepare the petition and to see that the transcript prepared by the register and transferred to the court of the responding State contains the necessary information and dates, and in proper form. It would appear that the transcript which is forwarded by the Alabama court should contain either security for cost or an affidavit of inability to

pay court costs, sometimes called a pauper's oath, on the part of the Petitioner, when such is requred by the law of the responding state. Therefore, the circuit solicitor, or other prosecuting attorney for the State, representing the Petitioner, should obtain either security for costs or an affidavit of inability of the Petitioner to pay court costs and see that it is contained in the transcript forwarded by the register to the court of the responding state.

I have been unable to find any provision which authorizes the Department of Pensions and Security, formerly the Department of Public Welfare, to obtain from the Petitioner security for costs or an affidavit of inability to pay in proceedings under the Uniform Reciprocal Support Act. In accordance with my conclusion, in answer to "C" above, it appears to be the duty, and it is my opinion, that the circuit solicitor, or other prosecuting attorney for the State, who has been directed by the court to represent the Petitioner, obtain security for costs or an affidavit of the Petitioner's inability to pay the court costs. This should be inserted into the transcript which the register forwards to the responding state just as any other attorney for the Petitioner would do.

Very truly yours,

JOHN PATTERSON,
Attorney General

November 22, 1955

Hon. R. R. Shields
Sheriff of Pickens County
Carrollton, Alabama

Sheriffs—Constitutionality—Constitutional Amendments—Costs and Fees—Expenses.

1. Act No. 571, General and Local Acts 1955 (Ms.), approved September 9, 1955, amending Title 11, Sections 34 and 100, Code of Alabama 1940, increasing certain items of fees, compensation and allowances to sheriffs during their term, is presently effective as to those items classified as ex officio fees, allowances for feeding, transferring or guarding prisoners, and compensation in the nature of expense allowances.

2. Act No. 571, General and Local Acts 1955 (Ms.), approved September 9, 1955, amending Title 11, Sections 34 and 100, Code of Alabama 1940, increasing certain items of fees, compensation and allowances to sheriffs during their term, is not effective as to those items not classified as ex officio fees, allowances relating to the

feeding, transferring or guarding of prisoners, or expense allowances, but will be effective at the beginning of the new term for sheriffs in January, 1959.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of October 31, 1955, is as follows:

"I was in the Sheriff's Office in Bessemer last week and the Sheriff informed me that they were collecting the new fees that was passed in the Legislature Act No. 571 House Bill 676 of the Amended Sheriff's fees. Being a Sheriff in a rural County and on the fee system it will help me considerably, and I would appreciate very much your opinion. The Act says it shall become effective immediately upon its passage and approval by the Governor, and the approval was signed September 9th, 1955, at 2:54, P. M."

I also have several other requests for official opinions from other sheriffs of the State of Alabama and from various clerks of the circuit courts of Alabama, asking similar or related questions.

In my opinion, sheriffs are entitled to receive some of the increased items provided for in Act No. 571, General and Local Acts 1955 (Ms.), approved September 9, 1955, but will not be entitled to receive other increased items in said Act No. 571, until the beginning of a new term in January of 1959.

Act No. 571, supra, amends Title 11, Sections 34 and 100, Code of Alabama 1940. Section 34, supra, is the civil schedule for fees for sheriffs in Alabama, while Section 100, supra, is the criminal schedule for fees and allowances for sheriffs in Alabama. Section 1 of Act No. 571, supra, amends the civil schedule and Section 2 of Act No. 571, supra, amends the criminal schedule.

It is my opinion that the following fees or items which were increased by Act No. 571, supra, will not be effective until the beginning of a new term for sheriffs in January of 1959, and that the fees provided for before the enactment of Act No. 571, supra, would be the proper fees in the following instances:

CIVIL SCHEDULE

Levying attachment . . . 6.00 (raised from 3.00).

Summoning each witness and returning subpoenas . . .75 (raised from .65).

Taking and approving bonds of every kind. . . .$2.00 (raised from 1.00).

Attendance upon the probate court when a jury is in attendance or upon the circuit court when a jury is in attendance, each day, to be paid out of the county treasury . . .6.00 (raised from 3.00)

Seizing personal property under writ of detinue . . .6.00 (raised from 3.00).

CRIMINAL SCHEDULE

Executng warrant or writ of arrest in misdemeanor cases . . .5.00 (raised from 2.00).

Executing warrants or writ of arrest in felony cases . . .5.00 (raised from 4.00).

For each bond or undertaking returned to court . . . 2.00 (raised from 1.00).

For serving each subpoena, notice, or scire facias. . . .75 (raised from .50). For attendance each day on the circuit or county court, to be paid by the county. . .6.00 (raised from 2.00).

For taking fingerprints of persons taken into custody and furnishing copies thereof to the Director of the Federal Bureau of Investigation and the Director, Department of Public Safety, pursuant to Act No. 420, H. 290, approved July 6, 1943, (General Acts of 1943, page 385) . . .1.00 (raised from .10).

As stated above, it is my opinion that the increased items above listed are not allowable to sheriffs during the current term, but will be allowable beginning in January, 1959, when the new term for sheriffs begins.

The following increased items, in my opinion, are now allowable and have been allowable to sheriffs since the effective date of Act No. 571, supra, at 2:54 p. m., September 9, 1955:

CIVIL SCHEDULE

Serving summons and other mesne process and returning the same, 1.50 **plus .10 per mile for each mile travelled in serving same** (the underscored provision was added by Act No. 571, supra.

When the sheriff is required by law to serve any process or paper by delivery to a person, he shall receive .10 per mile for each mile travelled in serving same (added to Civil Schedule by Act No. 571, supra).

Impaneling grand jury, advertising and attending all elections, in his county, and for all other public services not otherwise provided for, such sums as may be just, to be allowed by the county commissioners court, upon presentation of a verified account showing the items of service rendered, to be paid out of the county treasury, not exceeding six hundred dollars per annum. (The following provisio was deleted from the Civil Schedule by Act No. 571, supra: "Provided that any sheriff whose annual income from fees of office exceeds five thousand dollars net, after all expenses have been paid by him, shall not have any ex officio allowances, to be paid quarterly.")

CRIMINAL SCHEDULE

For removing any prisoner in cases where there is no jail in the county in which the offense is committed, or the jail therein is insecure, to the jail of another county, and for returning him to the jail of the county from which he was removed or to court for trial, 8.00 (increased from 3.00) for himself or his deputy acting in his stead and 8.00 (increased from 2.00) for each guard for each day they are respectively engaged in such removal, together with the actual necessary traveling expenses of himself, his deputy, and guard or guards and prisoner or prisoners, while on the trip, by the nearest route usually traveled between the points from and to which such removal is made **(if the trip is made in the personal car of the sheriff or his deputy or agent, he shall be allowed ten cents per mile travel in lieu of other transportation expenses)** to be taxed against and paid by such prisoner, on conviction, or, if he is insolvent, or is acquitted, by the county in which the offense was committed; but in no case shall the county to which such prisoner was removed be liable for such costs or fees. (The underscored provision was added by Act No. 571, supra.)

For removing any prisoner upon a change of venue granted in his case, or who is arrested on a warrant issued by a justice of the peace, or on an indictment, and confined in a county other than that in which he is triable, or arrested for contempt, or as a defaulting witness, 8.00 (increased from 3.00) for himself or his deputy acting in his stead, and 8.00 (raised from 2.00) for each guard for each day they are respectively engaged in such removal, together with the actual necessary traveling expenses of himself or deputy and guard or guards, and prisoner or prisoners, while on the trip, by the nearest route usually traveled between the points from and to which such removal is made, **(if the trip is made in the personal car of the sheriff or of his deputy or agent, he shall be allowed ten cents per mile in lieu of other transportation expenses)**. (The underscored provision was added by Act No. 571, supra.) As stated above, the last listed increased items were effective on September 9, 1955, the approval date of Act No. 571, supra, and are now effective.

Sheriffs now serving in Alabama were elected in November of 1954, and took office in January, 1955 (Title 17, Section 68, Code of Alabama 1940). Their terms are for four years, ending in January, 1959 (Constitution of

Alabama 1901, Section 138). Act No. 571, supra, increasing certain items in the civil and criminal schedules of fees and allowances for sheriffs was approved by the Governor on September 9, 1955, and, therefore, became effective after the commencement of the present term of office of sheriffs.

The following provisions of the Constitution of Alabama of 1901, and amendments thereto, are pertinent to the inquiry of whether or not said increased items are now effective:

Section 68, Constitution of Alabama 1901:

"The legislature shall have no power to grant or to authorize or require any county or municipal authority to grant, nor shall any county or municipal authority have power to grant any extra compensation, fee, or allowance to any public officer, servant, or employe, agent or contractor, after service shall have been rendered or contract made, nor to increase or decrease the fees and compensation of such officers during their terms of office; nor shall any officer of the state bind the state to the payment of any sum of money but by authority of law; provided this section shall not apply to allowances made by commissioners' courts or boards of revenue to county officers for ex officio services, nor prevent the legislature from increasing or diminishing at any time the allowance to sheriffs or other officers for feeding, transferring, or guarding prisoners."

Section 281 of the Constitution of Alabama 1901:

"The salary, fees, or compensation of any officer holding any civil office of profit under this state or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed."

Amendment XCII, Constitution of Alabama 1901 (otherwise known as the Boutwell Amendment), proclaimed ratified on May 16, 1952:

"Increasing or Decreasing Salaries, etc., of State and County Officers.

"Any provisions of this constitution or amendments thereto to the contrary notwithstanding, neither the legislature, nor any county of the state shall, by the imposition of new, different, and additional duties or otherwise, increase, or authorize the increase of, the salary, fees or other compensation of any officer of the state or of any county of the state, who is elected or appointed for a fixed term, during the term for which he is elected or appointed, regardless of whether such officer may be removed at the pleasure of the authority electing or appointing him or only upon impeachment; nor shall the legislature or any county of the state in any manner or by any means decrease, or authorize the decrease of, the salary, fees or other compensation of any such officer,

during the term for which he is elected or appointed; nor shall the legislature or any county of the state increase or decrease, or authorize the increase or decrease of, the salary, fees or other compensation of any person filling an unexpired term in any such office during the remainder of such term, either before or after the appointment or election of such person to fill the unexpired term. As to officers who are members of any court, board, commission, or similar body whose terms do not run concurrently, any increase or decrease in the salary, fees, or other compensation of the members of any such court, board, commission, or similar body shall become effective as to all such members thereof immediately after the expiration of the term or terms of office of the member or members whose term or terms first expire."

Without question, a sheriff is a public officer or a county officer within the meaning of Section 68, supra. He is also holding a civil office of profit under this State or county within the meaning of Section 281, supra. Further, it is my view that a sheriff is an officer of the State or of any county of the State who is elected or appointed for a fixed term within the meaning of the Boutwell Amendment, supra.

It should also be noted that Act No. 571, supra, does not purport in any manner to place upon the sheriff new or additional duties, and, therefore, cases such as **Jackson v. Sherrod,** 207 Ala. 245, 92 So. 481, and **Tayloe, et al. v. Davis, et al.,** 212 Ala. 282, 102 So. 433, are not applicable. Furthermore, the provisions of the Boutwell Amendment eliminate the possibility of increasing the compensation of certain officers by the imposition of new and additional duties during their terms.

It will be seen, therefore, that Section 68, supra, prohibits a change in the "fees and compensation" to public officers "during their terms of office," while Section 281, supra, prohibits a change in the "salary, fees, or compensation" of officers holding a civil office of profit under this State, or any county or municipality. Generally speaking, therefore, without any reference to the Boutwell Amendment, Sections 68 and 281, supra, would prohibit the changing by the Legislature of the salary, fees, or compensation of sheriffs during their term of office.

But, Section 68, supra, contains several exceptions. Section 68, supra, specifically provides that the prohibition against a change in fees or compensation during the term does "not apply to allowances made by commissioners' courts or boards of revenue to county officers for **ex officio services.**" (Emphasis supplied.) Furthermore, the prohibition in Section 68, supra, against changing fees and compensation does not apply when the Legislature changes, even during the term, "the allowance to sheriffs or other officers for feeding, transferring or guarding prisoners." These exceptions to the prohibition against changing compensation and fees during the term have not only been applied in respect to Section 68, supra, but also in respect to Section 281, supra. See **Macon County v. Abercrombie,** 184 Ala. 283, 63 So. 985, and **City of Birmingham v. Hawkins,** 208 Ala. 79, 94 So. 62. It appears, therefore, that when the

Legislature has provided for increased ex officio fees during the terms of public officers, such increase has been said by the courts not to violate that prohibition against changing fees and compensation included within Sections 68 and 281, supra.

Similarly, when items falling within the other exception in Section 68, supra, were increased by the Legislature during the term, such increase was held not to violate Section 68, supra. **Stone v. State,** 197 Ala. 293, 72 So. 536. The conclusion is, therefore, that if the change in compensation is in ex officio fees, or is an allowance to sheriffs or other officers for feeding, transferring or guarding prisoners, such change is not prohibited by either Section 68 or Section 281, supra. It is to be noted that in **Stone v. State,** supra, the increased guard fee was a fee for the personal services of the officer. It was held to be an allowance within the exception of Section 68, supra, and, therefore, not prohibited during the term of the officer. The court referred to the guard fee as compensation, but nevertheless not prohibited compensation within the meaning of Section 68, supra. The same may be said in reference to the new commissions allowed the tax collector in **City of Birmingham v. Hawkins,** supra. Such commissions or allowances were certainly compensation for personal services, but such compensation, allowance or fee, whatever it may be called, was within the exception in Section 68, supra, and the increased item was said not to violate Sections 68 and 281, supra. The term, "fees and compensation," therefore, has been defined by the above noted cases not to include ex officio fees or allowances to sheriffs or other officers for feeding, transferring or guarding prisoners.

I see no reason to give a different meaning to the words, "fees" or "compensation," as included in the Boutwell Amendment. It is my opinion, therefore, that neither Section 68 nor Section 281, nor the Boutwell Amendment prohibits the changing of ex officio fees during the term of an officer, including sheriffs, nor the changing of allowances for feeding, transferring or guarding prisoners. For this reason, therefore, I have listed among those fees or items which are now and have been effective since September 9, 1955, those items relating to ex officio fees and those items relating to the feeding, transferring or guarding of prisoners.

I have also listed as presently effective certain items relating to what may be called a mileage fee. In my opinion, these increased items are in the nature of a reimbursement for traveling expenses and are not an increase in salary, fees or compensation within the meaning of Sections 68 and 281, and the Boutwell Amendment, supra.

This office has recently held that although the Boutwell Amendment applies to judges of courts of record, the prohibition against changing salary, fees or other compensation would not apply to a lump sum expense account allowed to circuit judges. See letter of this office under date of October 13, 1955, addressed to Hon. Sim L. Howell, Chairman, Board of Revenue and Control, Morgan County, Decatur, Alabama. In principle, I see no difference in the allowing of an expense allowance to sheriffs or circuit

judges. Such items, in my opinion, are not an increase in salary, fees or other compensation and are, therefore, not prohibited.

I have listed above as not being presently effective certain fees and compensation. These items so listed were increased by Act No. 571, supra, during the present terms of sheriffs and none of said items fall within the exceptions above noted to Section 68, supra. Such fees or compensation are for personal services and intended to compensate the sheriff for his labors and cannot be said to be in the nature of a reimbursement for expenses, as I termed the compensation for mileage. I am, therefore, of the opinion that Sections 68 and 281, and the Boutwell Amendment, supra, prohibit the Legislature from increasing such items, and, therefore, such items will not be effective until the new term for sheriffs begins in January, 1959, See **Hawkins v. Jefferson County,** 233 Ala. 49, 169 So. 720; **State Docks Commission v. State, ex rel. Jones,** 227 Ala. 521, 150 So. 537, and letter of this office under date of October 1, 1955, addressed to Hon. Bill Rayburn, County Judge, Etowah County, Gadsden, Alabama.

Very truly yours,

JOHN PATTERSON,
Attorney General

November 29, 1955

Hon. Floyd Brown
Mayor of Albertville
Albertville, Alabama

Municipalities—Census.

1. A census, taken pursuant to the provisions of Title 37, Sections 481-484, Code of Alabama 1940, Section 483 of which was amended by Act No. 855, General and Local Acts 1953, page 1146, will effect a change in the form of a mayor-council type of city government, if such census shows that the population of the city has increased from less than 6,000 inhabitants to more than 6,000 inhabitants.

2. When a census, taken pursuant to the provisions of Title 37, Sections 481-484, Code of Alabama 1940, Section 483 of which was amended by Act No. 855, General and Local Acts 1953, page 1146, shows that a change in the form of a city government is warranted, such change will not take place until the next general municipal election held more than four months after said census shall have been taken and officially announced.

3. A city council must fix the salary of aldermen not less than 12

months prior to the general municipal election at which said aldermen are elected.

4. A city council may fix the salary of a president of the city council in an amount different from that fixed for the other aldermen.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, bearing date of October 12, 1955, is as follows:

"The city council of the city of Albertville provided by ordinance for the taking of the census pursuant to the provisions of Title 37, Chapter 10, Article 3, Alabama Code of 1940. The results of this census were filed with the Secretary of State on August 12, 1954, and showed Albertville to have a total population of 6,044.

"Section 404 of Title 37 (as amended by Act No. 394 of the Alabama Legislature of 1955) provides that the mayor of cities having a population of six thousand or more shall not sit with the council, nor have a vote in its proceedings. This section prescribes that the federal census shall control the classification. According to the last federal census the city of Albertville had a population of 5,385.

"Section 483 of Title 37 provides that when a census has been taken pursuant to the provisions of Section 481 and 482 it 'shall for all purposes govern' in cities with a population of less than 7000 and it is specifically stated that it shall control the form of government for such cities.

"In view of these two provisions of the law the following questions have arisen in our city:

"1. When the census referred to in paragraph one was taken and filed with the Secretary of State did the Mayor of Albertville cease to be a member of the city council?

"2. Should the city council now elect from its membership a president and president protemper pursuant to the provisions of Title 37, Section 428, as last amended?

3. Is Albertville now a city with a population of more than 6,000 within the meaning of Section 428 (as last amended, 429 and 457 of Title 37?

"4. If the answer to the above questions is 'No' then will these transitions occur after the next general election?

"By Act No. 394 of the Alabama Legislature of 1955 Section 404 of Title 37 was amended so that it provided that the aldermen 'in such municipalities' shall receive such salaries as the council may determine.

"5. Did this amendment give the city council of Albertville the power to set its salaries for the term beginning in 1956.

"6. If the answer to the above question is 'YES' and if the census referred to in paragraph one above authorizes a transition in the form of City government referred to in question 1 through 4 above, either now or following the next general election, and if the city council should pursuant to the provisions of Section 426 of Title 37, limit the council to five aldermen elected from the city at large, then would the council be authorized in fixing a different salary for its president than for the other members?

"You are respectfully requested to furnish us with your opinion on the above questions."

Title 37, Section 5, Code of Alabama 1940, provides, in part, as follows:

". . . The last census, **whether federal or taken as herein authorized,** shall be taken in determining the population of a city or town. At the next election more than four months after the ninetieth day after the first day of the first regular business session of the legislature held next after the publication by the federal government of the regular federal decennial population census for Alabama, if the municipality shows a population which authorizes a change in its government, under this title, the proper officers for such a city shall be elected and perform the duties herein prescribed." (Emphasis supplied.)

The Supreme Court of Alabama in the case of **Coons v. Isbell,** 222 Ala. 409, 132 So. 891, has construed Section 5, supra, in the following manner:

"The effect of the last-quoted section is that the result of the census determines whether a municipal corporation shall thereafter be classed as city or town, but does not, ex proprio vigore, effect that 'change in its government' which the statute provides for. That change is left by the statute to be wrought 'at the next election more than four months after the census shall have been taken and officially announced.' . . ."

Title 37, Section 483, as amended by Act No. 855, General and Local Acts 1953, page 1146, reads as follows:

"Census authorized to be taken in cities or towns, effect of.—Where the census of any city or town in this state has been or may hereafter be taken as provided by this article, and the report of the census thus taken has been or may hereafter be filed with the secretary of state, the census purporting to be a true and correct enumeration of the inhabitants residing in said cities and towns is, and shall be, ratified, con-

firmed and validated, and the report of said census, which has been or may hereafter be filed, shall for all purposes govern, and be taken as the true and correct census for all such cities and towns in the state when so taken. The form of government of such cities and towns shall be governed and controlled by such census when the same is so taken and a report thereof is filed in accordance with the provisions of this section."

It is my opinion that Section 483, as amended, supra, is in pari materia with Section 5, supra. Therefore, said Section 483, as amended, should be construed in the light of the ruling contained in **Coons v. Isbell,** supra. Therefore, your first, second, and third questions are answered in the negative. I am of the opinion that the form of government of your city will not change until the next general election in your city. At that time the people of the City of Albertville should elect the proper officials for a city of over 6,000 inhabitants.

In the light of the above discussion, your fifth question is answered in the affirmative.

Title 37, Section 404, Code of Alabama 1940, as amended by Act No. 394, General Acts 1955 (Ms.), approved September 9, 1955, reads in part as follows:

". . . The aldermen in such municipalities shall be elected by the city or town at large, at the first general election held on the third Monday in September, 1940, and quadrennially thereafter or from wards as the said councils may determine, not less than six months before an election, and shall receive such salary as the council may prescribe, which must be fixed by the council not less than twelve months prior to each general municipal election."

By virtue of Section 404, as amended, supra, the next general municipal election in the City of Albertville will be held on September 17, 1956, and the salary of the aldermen whose terms will begin in 1956 must have been fixed not less than 12 months prior to such election.

Therefore, in answer to your fifth question, I am of the opinion that it is now too late for the city council of the City of Albertville to fix the salary of the aldermen whose terms will begin in 1956. Said aldermen will receive the same salary as that now received by the present members of the city council since the amount of said salary was fixed more than 12 months prior to September 17, 1956.

Section 404, as amended, supra, leaves the amount of the salary of aldermen to the sole discretion of the city council. There is no provision of said section prohibiting a city council from fixing a different salary for the president of the city council than for the other aldermen.

Therefore, in answer to your sixth question, I am of the opinion that a city council may fix the salary of the president of the city council in a different amount from that fixed for the other aldermen. Of course, the city council of the City of Albertville may not do this with respect to the aldermen whose terms will begin in 1956, for the reasons discussed above in my answer to your fifth question.

Very truly yours,

JOHN PATTERSON,
Attorney General

December 6, 1955

Hon. Roy O. Hill
Clerk of the Circuit Court
Houston County
Dothan, Alabama

Hon. Curtis H. Rodgers
Clerk of the Circuit Court
Covington County
Andalusia, Alabama

Sheriffs—Clerks of Circuit Courts—Costs and Fees—Mileage—Constables—Courts.

1. Sheriffs are entitled to receive a fee of ten cents per mile when serving a writ of subpoena on witnesses in civil cases.

2. A writ of subpoena is a "mesne process."

3. When claiming mileage for serving subpoena on witness in civil case, sheriff should endorse on subpoena returned the amount of mileage claimed.

4. When endorsing amount of mileage claimed on witness subpoena in civil case, sheriff need not attach affidavit thereto.

5. Constables are entitled to receive sheriffs' fees under the new schedule (Act No. 571, General and Local Acts 1955 (Ms.), approved September 9, 1955, amending Title 11, Sections 34 and 100, Code of Alabama 1940) in civil cases wherein the amount in controversy is twenty dollars or more.

6. A sheriff serving two writs of subpoena on separate witnesses in civil cases at the same address in the same case is entitled to receive mileage in respect to each subpoena.

7. Act No. 571, General and Local Acts 1955 (Ms.), approved September 9, 1955, amending Title 11, Sections 34 and 100, Code of Alabama 1940, insofar as it amends the civil schedule of fees for sheriffs, applies in both law and equity cases.

Opinion by Assistant Attorney General Sykes.

Dear Sirs:

Under date of November 22, 1955, this office issued an opinion to Hon. R. R. Shields, Sheriff of Pickens County, Carrollton, Alabama, wherein it was held that Act No. 571, General and Local Acts 1955 (Ms.), approved September 9, 1955, amending Title 11, Sections 34 and 100, Code of Alabama 1940, increasing certain items in the schedule of fees for sheriffs, was presently effective as to some fees, but was not effective as to other fees until the beginning of the new term for sheriffs in January, 1959.

I have several other questions from clerks and sheriffs in connection with said opinion and said Act No. 571, supra. These questions are as follows:

1. Is the sheriff entitled to a fee of ten cents per mile when he serves a subpoena for a witness in a civil case?

2. In what manner does the sheriff indicate to the clerk the proper mileage to be charged?

3. Does Act No. 571, supra, increasing the fees of sheriffs, apply to constables?

4. If a sheriff is entitled to charge mileage for the service of a subpoena on a witness in a civil case, and two or more subpoenas are issued on the same day in a certain case to persons at the same address, would the sheriff be entitled to charge mileage on each subpoena?

5. Does Act No. 571, supra, insofar as it amends Title 11, Section 34, Code of Alabama 1940, apply to equity cases?

In answer to question numbered 1, it is my opinion that the sheriff is entitled to receive the fee of ten cents per mile when serving a subpoena for witnesses in civil cases, the fee to be calculated as a round trip; that is to say, both for the outgoing trip and the return trip.

In answer to question numbered 2, it is my opinion that the sheriff may endorse upon the subpoena the total mileage claimed, and need not attach an affidavit or oath that the item is correct.

In answer to question numbered 3, it is my opinion that Act No. 571, supra, which increases certain fees of sheriffs, is applicable when the constable performs the services of the sheriff, but only in cases wherein the amount in controversy is twenty dollars or more.

In answer to question numbered 4, it is my opinion that a sheriff, serving two subpoenas in the same case on the same day on witnesses residing at the same place, is entitled to receive ten cents per mile in respect to each witness.

In answer to question numbered 5, it is my opinion that Act No. 571, supra, insofar as it amends Title 11, Section 34, Code of Alabama 1940, applies both to cases at law and in equity.

(1)

In the opinion under date of November 22, 1955, supra, this office held that the following fees, among others, were presently allowable, and have been allowable, to sheriffs since September 9, 1955, the effective date of Act No. 571, supra:

"CIVIL SCHEDULE

"Serving summons and other mesne process and returning the same, 1.50, **plus .10 per mile for each mile travelled in serving same** (the underscored provision was added by Act No. 571, supra).

"When the sheriff is required by law to serve any process or paper by delivery to a person, he shall receive .10 per mile for each mile travelled in serving same (added to Civil Schedule by Act No. 571, supra)."

Title 7, Section 449, Code of Alabama 1940, requires the sheriff, when serving a writ of subpoena in civil cases, to serve the subponea upon the witness personally, or to serve it upon the witness by leaving the subpoena at the witness's place of residence. Of course, if the subpoena is issued while the court is in session, then it must be executed by personal service.

It is unnecessary to decide, however, whether or not a subpoena for a witness in a civil case is a process or paper required by law to be served "by delivery to a person," within the meaning of that phrase as used in Act No. 571, supra, because Act No. 571, supra, also allows a fee of ten cents per mile for each mile travelled in serving "summons and other mesne process." The Supreme Court of Alabama has decided that a subpoena for a witness in a civil case is a mesne process. **Birmingham Dry-Goods Co. v. Bledsoe,** 113 Ala. 418, 21 So. 403. So far as the subpoena is concerend, therefore, it is immaterial whether the sheriff serves it personally or by leaving it at the place of residence of the witness. He may claim his ten cents per mile because he has also served a mesne process.

(2)

Act No. 571, supra, does not direct the manner in which the sheriff claims his mileage fee for serving subpoenas on witnesses in civil cases, but it is obvious that the clerk must have some information upon which to calculate the amount of mileage to be taxed as cost for the sheriff. In my opinion, it is incumbent upon the sheriff to furnish this information to the clerk and to record this information by endorsing upon the subpoena returned to court the total mileage claimed in respect to the service of the subpoena. The sheriff should, therefore, endorse on the returned subpoena the number of miles travelled in serving the subpoena, including his return trip. He should also endorse his name as part of this statement.

I find no provision of law requiring the sheriff to take oath or attach an affidavit to the effect that the mileage so endorsed is true and correct, and, therefore, said statement of mileage endorsed on the subpoena by the sheriff need not be sworn to because the law does not require it.

(3)

Title 11, Section 39, Code of Alabama 1940, sets out the fees for constables. It is provided in said section that in civil cases where the amount in controversy is twenty dollars or more, the constable who performs the same services as the sheriff is entitled to receive sheriffs' fees. It, therefore, follows that in civil cases wherein the amount in controversy is twenty dollars or more, and the constable serves subpoenas on witnesses, he is entitled to receive the mileage fee in the amount of ten cents per mile, the same as the sheriff. This would, of course, apply to all other services performed by the constable where the amount in controversy is twenty dollars or more. See Quarterly Report of Attorney General, Vol. 11, page 94.

(4)

In an opinion of this office under date of June 25, 1951, appearing in Quarterly Report of Attorney General, Vol. 63, page 44, this office held, in construing Act No. 177, General Acts 1947, page 62, that the sheriff was entitled to receive the mileage fee of ten cents per mile in respect to each defendant arrested, even though he arrested two defendants on one trip. Act No. 177, supra, construed in that opinion, provided for a mileage fee in connection with a sheriff's serving of a writ of arrest. In my opinion, the same principle would apply when the sheriff serves two writs of subpoena on the same case at the same place. It is my opinion, therefore, that mileage may be charged in respect to each subpoena served upon a witness in a civil case. See also, letter of this office under date of May 10, 1954, addressed to Hon. John McCutcheon, Sheriff, Morgan County, Decatur, Alabama.

(5)

In my opinion, Section 34, as amended, supra, setting out the civil schedule of fees for sheriffs, applies both in law and equity cases. Certain fees are included in this schedule which could only be applicable to equity cases. For example, "serving subpoenas on bills in chancery proceedings, and returning the same, for each defendant . . . 1.50." In my opinion, pertinent fees provided for in Section 34, as amended, supra, apply in equity cases, including the fee and mileage for mesne process, which, as stated above, includes a writ of subpoena for a witness in a civil case, and also the fee for summoning each witness and returning subpoenas. This latter fee was increased from sixty-five cents to seventy-five cents by the terms of Act No. 571, supra, and it is to be noted that the increased fee for summoning a witness is not effective until the beginning of the new term for sheriffs in January, 1959. The mileage fee, however, in equity cases is presently applicable.

Yours very truly,

JOHN PATTERSON
Attorney General

December 9, 1955

Hon. J. S. Snoddy
Commissioner
Department of Pensions and Security
State of Alabama
Montgomery 5, Alabama

Appropriations—Pensions and Security, Department of.

The provisions of Section 2, subsection V (16), of Act No. 348, General and Local Acts 1955 (Ms.), approved September 9, 1955 (General Appropriation Act of 1955), appropriating $100,000.00 to the Department of Pensions and Security for research and indigent care in nutritional and related subjects at the Spies Clinic, discussed generally.

Opinion by Assistant Attorney General Lee.

Dear Sir:

Your request for an official opinion bearing date of November 23, 1955, is as follows:

"We call your attention to an appropriation contained in Act No. 348, Section 2, V, (16), Acts of 1955 Regular Session, which provides in pertinent part as follows:

"'DEPARTMENT OF PUBLIC WELFARE (now DEPARTMENT OF PENSIONS AND SECURITY):

. . . . . .

" 'For research and indigent care in nutritional and related subjects at the Spies Clinic, located at Birmingham, Alabama, conditional upon the condition of the treasury and with the approval of the Governor. .$100,000
" 'It is provided that not more than twenty-seven and one half percentum of the appropriations hereinabove made shall be allotted in any one quarter of a fiscal year.'

"One-fourth of this amount ($25,000) has been approved by the Governor and transferred to the Pensions and Security Trust Fund. Since this is the first time such an appropriation has been made to this agency, I would like to ask for your official opinion on the following questions:

"1. Under what authority can this Department release the above mentioned appropriation to the Spies Clinic?

"2. If this Department is authorized to release this money, would the attached request provide a sufficient basis on which to release it?

3. If the attached request is a sufficient basis on which to release the money, are additional data and documents with reference to expenditures required?

"a. Could the money for salaries be released to persons not subject to the Merit System?

"b. If not, could the money be released for services rendered?

"4. If the attached request is not sufficient basis on which to release the money, and if this agency has authority to release the money, what plans and procedures would be required?

"a. Does the law presume the development of a written agreement between this Department and the Spies Clinic detailing the way in which the Spies Clinic will expend the money?

"b. Should the official of the Spies Clinic to whom the funds are released be required to be bonded?

"c. Would the expenditures of the funds be audited in this Department or at the Spies Clinic? If the expenditures are audited in this Department, what supporting documents would be required?

"Since money has been allotted for the first quarter under this appropriation, I would appreciate an early answer to the questions raised above."

Your request for opinion requires that I consider certain provisions of the General Appropriation Act of 1955 (Act No. 348, General and Local Acts 1955 (Ms.), approved September 9, 1955) and advise as to the administration of the amount there appropriated. The particular portion of such act on which you request my opinion is to be found in Section 2, subsection V (16), pertaining to the Department of Public Welfare, now known as the Department of Pensions and Security. As a part of the appropriation to this department, is an item in the amount of $100,000.00 appropriated for the following purpose:

"For research and indigent care in nutritional and related subjects at the Spies Clinic, located at Birmingham, Alabama, conditional upon the condition of the treasury and with the approval of the Governor."

With reference to the entire appropriation to this department, it is provided that not more than 27½ per centum of the appropriation made shall be allotted in any one quarter of a fiscal year. This restriction would apply to the above mentioned appropriation relating to the Spies Clinic.

I understand from your request that of the aforementioned $100,000.00 appropriation, $25,000.00 has been approved by the Governor and has been transferred to the Pensions and Security Trust Fund and that you desire my official opinion before you proceed to administer or disburse these funds now held by you. Accompanying your request, I find a copy of a letter addressed to you by Dr. Tom D. Spies, Director of the Spies Clinic, which, in effect, requests that you forward him in lump sum amount the monies now held by you.

Certain observations would appear appropriate before I proceed to give answer to the specific inquiries you have propounded. I note that throughout your request for opinion you repeatedly make reference to the "release" of the appropriation here considered to the Spies Clinic, and repeatedly request information as to the conditions and circumstances under which such appropriation may be "released" to the Spies Clinic. By reason of such verbiage, I am led to believe that you are of the opinion that this appropriation, in such amount as now held by you, may be released or forwarded in toto to the Spies Clinic. Such is not my understanding or construction of this portion of our General Appropriation Act, it being, rather, my judgment and opinion that the appropriation here in question is made to the Department of Pensions and Security for administration by that department in conformity with the provisions of the appropriation act and such resulting rules and regulations as may be formulated by the department as well as the terms of such contractual agreement as may be entered into by the department and the named clinic.

To conclude other than above stated would lead one into a serious consideration of certain constitutional inhibitions against such an appropriation. Were this appropriation made as a direct appropriation to the clinic, then, of necessity, I would be required to consider the effect and influence of Sections 93 and 94 of our Constitution on such an appropriation. It might, likewise, become necessary that I consider the effect of Section 73 of the Constitution of Alabama 1901, if such had been the case. However, the fact that such appropriation is made to the Department of Pensions and Security for its control and administration obviates the necessity of such consideration.

Under the terms of Section 71 of the Constitution of Alabama 1901, making provision for the general appropriation bill, it is provided that such bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative, and judicial departments of the State, for interest on the public debt, and for the public schools. Said section likewise provides that all other appropriations shall be made by separate bills, each embracing but one subject. In order to give effect to the appropriation here considered one must assume that the appropriation relates to expenses falling within the category of "ordinary expenses" of one of our three branches of government. Properly indulging all presumptions in favor of the validity of this legislative act, warrants the adoption of this assumption. Furthermore, determination as to the question of the public nature of the purposes stated in connection with said appropriation must be resolved in favor of the right of the Legislature to so appropriate. It is stated in 81 C. J. S., States, Section 133, that:

> "Generally, in connection with the validity of the expenditure of state funds, what is for the public good, or what is a public purpose, is a question for the legislature to decide, with respect to which it is vested with a large discretion, which cannot be controlled by the courts unless its action is clearly evasive."

Being mindful of this provision of law, I conclude that the purposes for which said appropriation is here made are public purposes and said appropriation falls within the power and authority of the Legislature to make such a grant.

Having determined such appropriation to constitute an ordinary expense of government and, hence, pertinent to the General Appropriation Act, and having further concluded that such appropriation is made for a public purpose, it should next be determined the method or manner by which the State agency, the Department of Pensions and Security, should administer the funds so appropriated to it.

It has been well stated that authority of law is necessary to an expenditure of public funds. As a rule, money cannot be drawn from the treasury of a state except in pursuance of a specific appropriation made by law. The power of the Legislature with respect to the public funds raised by general taxation is supreme, and no state official, from the highest to the lowest, has any power to create an obligation of the state, either legal or moral, unless there has first been a specific appropriation of funds to meet the obligation.

In specific terms, an "appropriation" has been defined as an authority of the Legislature, given at the proper time and in legal form to the proper officers, to apply a distinctly specified sum from a designated fund out of the treasury, in a given year, for a specified object or demand against the state. In general terms, an appropriation is the act of setting money apart formally or officially for a special use or purpose by the Legislature in clear and unequivocal terms in a duly enacted law. See 42 Am. Jur., Public Funds, Sections 42 and 43.

In the instant case, the appropriation once made and approved by the Legislature becomes subject to all of the applicable financial controls prescribed by law including allotment as well as reversion of any unused amounts at the end of the fiscal period. Title 55, Sections 92-107, Code of Alabama 1940.

With the above in mind, I look to the specific terms of that portion of the General Appropriation Act relating to this appropriation. It is there found that such appropriation is made to the Department of Pensions and Security, "For research and indigent care in nutritional and related subjects at the Spies Clinic, located at Birmingham, Alabama, conditional upon the condition of the treasury and with the approval of the Governor." Although general in nature, the above-stated purposes are sufficient to convey to the Department of Pensions and Security the intent of the Legislature regarding the expenditure of the appropriation here in question. It would appear that the Legislature has appropriated and set aside this specified amount to the department solely for expenditure in connection with research and indigent care in nutritional and related subjects at the designated clinic. It would be my opinion that the department could expend the funds so appropriated for no other purpose nor at any other institution rendering like services. In this connection, insofar as is known to this office, the Spies Clinic is an unincorporated association engaging in research and clinical services at the Hillman Hospital in Birmingham, Alabama. It is my understanding that this organization or association is not incorporated under the laws of the State of Alabama nor registered in the State of Alabama as a body corporate.

In my opinion, the Legislature, in making such an appropriation to the department, has issued its directions to the department to develop, pursuant to law, the manner in which such funds should be expended. With this in mind, it would be my further opinion that it then becomes the duty and responsibility of the department to carry into effect this legislative direction by establishing suitable and adequate ways and means by which the department and the Legislature may be assured that such appropriation is expended in the manner prescribed. This would, of necessity, impose upon the department the duty of establishing adequate fiscal safeguards as to the expenditure of such money and would likewise impose upon the department the duty of making an accounting to the Legislature for the expenditure of any funds from this appropriation.

With the above observation, I turn to the specific questions propounded by you. The first of these concerns the authority of the department to release the above mentioned appropriation to the Spies Clinic. In answer to same, I would advise that the department is vested with no authority to "release" the appropriation to the Spies Clinic, but, rather, that the department is authorized to set aside the funds so appropriated in an account or fund to be expended in accordance with the terms of the legislative appropriation and the subsequent contract entered into between the department and the Spies Clinic. Payments should be made from such account or fund to the Spies Clinic when the department has been presented with a claim or claims by the clinic for expenditures made within the stated purposes of the appropriation and in conformity with the contractual agreement entered into by the two parties.

Having answered your first inquiry, it becomes unnecessary to give answer to your second inquiry, for the reason that I have stated that the department is not authorized to release this appropriation to the clinic. Like reasoning would pertain to your third inquiry.

Turning my attention to your fourth inquiry, I would advise with reference to subsection (a) thereof that it would be my opinion that both the law and the terms of the legislative appropriation anticipates the development of a written contractual agreement between the department and the Spies Clinic pertaining to the manner in which and the purposes for which the appropriation might be expended. It would be my judgment that the terms of such agreement could best be worked out by the appropriate members of your department working in conjunction with the officials of the clinic, but I emphatically feel that some such contractual agreement should be entered into whereby both the State of Alabama and the agency concerned would be fully aware of their respective obligations and protected in their acts in making claim upon or expenditure from this appropriation.

Regarding subsection (b) of inquiry four, I would advise that, in view of the answer heretofore given to your previous inquiries, such matter would become immaterial. As I have indicated, expenditures should be made by the department from this appropriation only upon the presentation of valid claims by the clinic detailing the services rendered within the fields or purposes covered by the appropriation. If this be done, it would be of no consequence to the State of Alabama as to whether or not the funds expended in payment of such claims be delivered to a person covered by surety bond.

Regarding subsection (c) of your fourth question, concerning the audit of such funds, I would advise that insofar as the State of Alabama, and particularly the legislative branch thereof is concerned, audit of the expenditure of such funds would be made as a part of the regular audit and examination of funds administered and expended by the department. As I have stated, it is my opinion that this appropriation should be handled as are other monies of the department, merely as an additional account, or an additional fund, administered by the department, constituting a part of the fiscal oper-

ations of the department and audited as are other funds of the department.

I might, perhaps, further point out that the duty and responsibility as to the audit of claims made upon this account, or fund, would include audit by the department official charged with the administration of the fiscal affairs of the department with a view to ascertaining and determining the validity of the claims presented. This examination should include determination as to whether or not the claims reflect expenditures falling within the allowed purposes of the appropriation, and also a determination as to whether such claims fall within the purview and scope of the contractual agreement existing between the department and the clinical agency. It would, likewise, appear appropriate that the department be clothed with the right of examination of the records and accounts of the clinic, to be incorporated in the contractual agreement, as it pertains to the expenditure of these appropriated monies.

I would further recommend that the contract contain the specific type of service which the department would require from the Spies Clinic. Such a description would contain the definition of the type of services to be performed. In describing the services, the contract should make it clear whether the department is requiring a separate project or an extension of an already existing project. The contract should further state whether the department will require reporting from the Spies Clinic to the department as to the progress on the project. The contract would, of necessity, state that the department cannot reimburse except as the conditional appropriation is made available to the department. It would be advisable for the department to require a detail of the types of expenditures for which reimbursement is sought in the contract. This would be important in connection with the audit which the department will make pursuant to the contract as well as important to the department in connection with the regular audit of its expenditures by the examiners of public accounts.

The procedure discussed here contemplates that the department will be billed on a reimbursement basis after the services have been performed. The bills should be itemized, certified, and notarized in duplicate when submitted by the Spies Clinic and should show that the services were rendered for a specific period. After the appropriate officer at the Department of Pensions and Security audits these bills, or bill, rendered to determine that they are in conformity with the contract, and in the manner prescribed by Title 55, Section 84, Code of Alabama 1940, reimbursement should be made to Spies Clinic.

Inasmuch as this is a new relationship between the Spies Clinic and the Department of Pensions and Security, this office has set forth these details in an attempt to be helpful to both parties concerned.

Yours very truly,

JOHN PATTERSON
Attorney General

December 12, 1955.

Hon. W. A. McClinton
Tax Collector,
Mobile County,
Court House,
Mobile, Alabama.

Counties—Mobile County—Gasoline and Gasoline Tax—Tax Collectors.

1. The provisions of the Mobile County motor fuel tax law, Act No. 369, Regular Session 1955 (Ms.), approved September 7, 1955, differs in material respect from the provisions of the Alabama gasoline tax law, Title 51, Section 646, et seq., Code of Alabama 1940, as amended, and the Alabama diesel fuel tax law, Act No. 590, General Acts 1939, page 958, as amended (Title 51, Section 665 (1), et seq., 1953 Cumulative Pocket Part, Code of Alabama 1940). These are separate and distinct laws and each of said laws must be administered and enforced in strict accordance with its own provisions. Exemptions contained in any one of these laws could not be allowed under the provisions of either of the other laws unless similar exemptions are expressly contained in each of the laws.

2. Under Act No. 369, supra, the Mobile County motor fuel tax applies to gasoline, naphtha, diesel fuel, or other liquid motor fuels, or any device or substitutes therefor when same are sold, delivered, withdrawn from storage, or kept in storage for sale or delivery in Mobile County, regardless of what use is thereafter made of such products. Under this Act, kerosene oil, fuel oil, or crude oil are not taxable when used for lighting, heating, or industrial purposes, but these products are taxable when sold, delivered, withdrawn from storage, or kept in storage for sale or delivery in Mobile County to be used in propelling a motor vehicle over the highways.

3. Under Act No. 369, supra, diesel fuel is taxable when sold, delivered, withdrawn from storage, or kept in storage for sale or delivery in Mobile County, regardless of how it is later used. So-called liquid petroleum gases, such as butane and propane, are subject to the provisions of Act No. 369, supra, and are taxable under the same conditions as diesel fuels are taxed under the Act.

4. The excise tax under Act No. 369, supra, is levied in general terms and there is nothing in the Act to expressly indicate that it was the intent of the Legislature to tax Mobile County.

5. Act No. 369, supra, does not exempt farmers or motor fuels used in farm tractors from the Mobile County motor fuel tax.

6. Act No. 369, supra, does not authorize the payment of the costs of collecting the tax from the proceeds derived therefrom, nor does the Mobile County governing body have the authority to remedy this situation by rules or regulations.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of November 1, 1955, is as follows:

"At the recent regular session of the Legislature of Alabama, there was enacted Act No. 369 (HB 952), approved by the Governor on September 7, 1955. This was a local act relating only to Mobile County, by the terms of which there was levied a county privilege or license tax upon every person, firm or corporation selling, delivering, or withdrawing from storage or keeping in storage for sale or delivery in Mobile County, any gasoline, naphtha, diesel fuel, or other liquid motor fuels, or any device or substitutes therefor, commonly used in internal combustion engines, but not including 'kerosene oil', 'fuel oil', or 'crude oil' commonly used for lighting, heating or industrial purposes, in an amount equal to two cents ($.02) per gallon sold, delivered, withdrawn from storage, or kept in storage for sale or delivery. A copy of such Act, together with a copy of the ordinance or resolution adopted by the County governing body in furtherance thereof, are enclosed herewith for your information and use in rendering the opinion hereinafter requested.

1. "As appear from the context of my letter, I am anxious as far as lawfully possible, to pattern my duties and actions under this local Act with those governing the levy and collection of the state excise takes on such products, and to accord similar exemption privileges in favor of those burdened by the tax.

2. "Numerous inquiries have been made of the undersigned, who is by the Act charged with the collection of such tax, as to whether or not any attempt will be made by this office to charge and collect such two cent per gallon tax on (1) gasoline (2) diesel fuel (3) naphtha, or other motor fuels used in internal combustion engines sold, but not used or to be used, in the operation of any vehicle upon the highways of this state. As you are aware, Section 665 (1) of Title 51 of the Code of Alabama of 1940, as amended, has a provision to the effect that the state's excise tax on such motor fuel is applicable only when same is sold or withdrawn in this state for the operation of any motor vehicle upon the highways of this state.

3. "It is the thought of the writer that this law was enacted in the knowledge of existing provisions as to diesel fuel as a motor fuel, used to a great extent for industrial purposes, and not for vehicle's use on the

highways of this state. Even tho the Act in question specifically uses 'diesel fuel' as being subject to the tax, would it not be consistent and lawful for the seller, where the facts warrant, to claim as exempt from this tax all diesel fuel which is not sold for use in the operation of any motor vehicle upon the highways of this state? In a similar category, it would appear to me, would fall butane, propane or like products which, while to some extent used to propel motor vehicles on the highways, are used primarily for heating and industrial purposes.

4. "Further questions upon which I desire your opinion is whether or not the sale of any gasoline to Mobile County would be exempt from the tax of this act as being within the term of 'an incorporated municipality' as used therein?

5. "Farmers are questioning if the tax imposed by this bill is charged them on gasoline used in farm tractors, will they be allowed a refund as they are by the State.

"Your official opinion herein is therefore necessary, as well as urgent, in view of the fact such tax has now become payable at this office."

Your supplemental request for an official opinion bearing date of November 29, 1955, is as follows:

"An additional question has arisen in regard to Act No. 369 which created the County gasoline tax in Mobile County. Please accept my personal apologies for not including this question in my original request to you dated November 1, 1955, and please permit this supplement.

6. "With reference to Section 4 of the abovementioned Act, please pass on to me your opinion as to whether or not under this Section the governing body of Mobile County has been allowed to pay expenses in collecting the gasoline tax and, in general, in enforcing the Act."

1. Your first question appears to be whether or not you can administer and enforce the Mobile County motor fuel tax levied under the provisions of Act No. 369, Regular Session 1955 (Ms.), approved September 7, 1955, in the same manner as the State has been and is now administering and enforcing its gasoline tax laws under Title 51, Section 646, et seq., Code of Alabama 1940, as amended, and the diesel fuel tax laws under Act No. 590, General Acts 1939, page 958, as amended (Title 51, Section 665(1), et seq., 1953 Cumulative Pocket Part, Code of Alabama 1940), and whether or not the same exemptions which apply to these State laws would apply to said County motor fuel tax law. This is a very broad and general question which will have to be answered in the same way as it will be impossible to treat with or even anticipate all of the situations which may arise in the future under Act No. 369, supra.

The State gasoline and diesel fuel tax laws and the Mobile County motor fuel tax law are not similar in language, and in many respects differ to a material extent. The Mobile County law has not, by reference or otherwise, adopted any of the provisions of the State laws. Therefore, Act No. 369, supra, will have to be construed in accordance with its own provisions. It would not be permissible for you to read into the law anything that is not expressly provided for therein.

The tax levied by the Mobile County motor fuel tax law, when considered in the light of the provisions of said law in its entirety, is in the nature of an excise tax levied on "every person, firm or corporation selling, delivering, or withdrawing from storage or keeping in storage for sale or delivery in Mobile County, any gasoline, naptha (sic), diesel fuel, or other liquid motor fuels, or any device or substitutes therefor." Thus, the tax attaches upon the happening of the first taxable event, which generally will be the delivering, storing, or withdrawing from storage in Mobile County, any of the motor fuels described in said Act. As it is a custom for such motor fuels to be delivered or stored or withdrawn from storage mainly at the wholesale level, it is possible for the tax to be reported and paid, as the State tax is reported and paid, on the wholesale level by the wholesaler or jobber. In this respect, Act No. 369, supra, provides, as the State motor fuel tax laws provide, that the tax shall be collected but once in any particular allotment or consignment of motor fuel. As a matter of information, it might be stated at this time that the State tax on both gasoline and diesel fuel is collected almost entirely on the wholesale level from the wholesaler or jobber. This is true inasmuch as the tax is to be collected but once and inasmuch as the tax falls due upon the happening of the first taxable event prescribed by these laws, which is usually the withdrawal of the gasoline from storage in this State by the wholesaler or jobber.

The levying sections of the State gasoline tax law and Act No. 369, supra, are somewhat similar except for the fact that the levying section of Act No. 369, supra, is broader and more comprehensive in that it applies to delivering or storing motor fuel for sale or delivery in Mobile County, in addition to withdrawing the motor fuel from storage for sale or any other use. However, it still appears that the Mobile County tax can be collected mainly at the wholesale level from the wholesaler or jobber, as the wholesaler or jobber will principally, if not exclusvely, deliver or store the motor fuel in Mobile County. That is the general practice of the industry. It would, therefore, appear that in most instances you could require the wholesaler or jobber to both report and pay the tax on a monthly basis as prescribed under Sections 1 and 2 of Act No. 369, supra. This would serve to both concentrate and simplify the collection of the tax.

Your attention is called to the fact that Act No. 369, supra, does not contain any provisions which would require the wholesaler or jobber to secure a permit or license and to file an appropriate surety bond to guarantee the reporting and payment of the tax as required under Title 51, Section 666, et seq., Code of Alabama 1940, the State gasoline and motor fuel laws. Therefore, you could not require such license and bond under the Mobile County

Act, but you could require the wholesaler or jobber to account to you for the tax and to also report and pay the tax.

With respect to your inquiry under this question, concerning whether exemption privileges similar to those contained in the Alabama gasoline and diesel fuel tax laws could be accorded under Act No. 369, supra, it is my opinion that they could not be so accorded, unless such exemptions are expressly provided for within the provisions of Act No. 369, supra. Again, you could not read into Act No. 369, supra, any exemption which is not expressly contained therein. The fact that an exemption is contained in the Alabama gasoline and diesel fuel tax laws would not authorize the granting of such exemption under Act No. 369, supra.

Exemptions from taxation are not matters of right, but can be granted only when the Legislature has expressly provided for same in the particular act or statute involved. Moreover, as exemptions are special privileges granted to one class of taxpayers, usually at the expense of others, such exemptions are very strictly construed against the taxpayer where there is any doubt as to whether or not they apply. **Sanitary Dairy v. State,** 261 Ala. 640, 75 So. 2d 611; **Curry v. Reeves,** 240 Ala. 14, 195 So. 428; **Bowman v. State Tax Commission,** 235 Ala. 190, 178 So. 216.

2. In your second question you ask whether or not, under the provisions of Act No. 369, supra, the Mobile County motor fuel tax would apply to gasoline, diesel fuel, naphtha, or other motor fuels used in internal combustion engines where such motor fuels are delivered, stored, withdrawn from storage, or sold within Mobile County and where such motor fuels are used for purposes other than to propel a motor vehicle over the highways. You call attention to the State diesel fuel tax levied under Act No. 590, as amended, supra, and to the fact that Section 3 of that Act has a specific provision to the effect that the State excise tax on diesel fuel is applicable only when such motor fuel is stored or withdrawn from storage or sold in this State to be used to propel a motor vehicle over the highways of Alabama. As heretofore stated, the State gasoline and diesel fuel tax laws are independent and distinct laws from Act No. 369, supra, and the fact that the State diesel fuel tax law does have such a provision would have no bearing on the administration and enforcement of the Mobile County motor fuel tax law as it does not have a similar provision. Therefore, in levying the Mobile County motor fuel tax, you will be governed solely by the provisions of Act No. 369, supra.

Under Section 1 of Act No. 369, supra, the levy of the tax is not confined to the "use" of gasoline, naphtha, diesel fuel, or other liquid motor fuel, or any device or substitutes therefor, on the highways of this State. On the contrary, Section 1 provides that said motor fuels are to be taxable upon the "selling, delivering, or withdrawing from storage or keeping in storage for sale or delivery in Mobile County," without any reservation being made as to how such motor fuels are to be used. The only exception to this is in the case of " 'kerosene oil,' 'fuel oil,' or 'crude oil' commonly used for lighting, heating, or industrial purposes." This latter provision has obviously been taken from the definition section of the State gasoline tax law which is

found in Title 51, Section 646, Code of Alabama 1940, prior to said section having been amended by Act No. 772, General and Local Acts 1953, page 1036. Under said amendment this provision was changed to read "that nothing in this article shall be held to apply to those products known commercially as 'kerosene oil,' 'fuel oil,' or 'crude oil' when used for lighting, heating or industrial purposes." After conferring with the Chief of the Gasoline Tax Division of the State Department of Revenue, it is my information that since the inception of the State gasoline tax law in 1935, the Department has construed said provision as contained in Section 646, supra, prior to amendment in 1953, to mean that the gasoline tax was not to apply to kerosene oil, fuel oil, or crude oil when used for lighting, heating, or industrial purposes, but would apply to such petroleum products when used as a component part of a motor fuel to propel a motor vehicle over the highways of this State. The Alabama gasoline tax law has been both administered and enforced accordingly since 1935. Section 646, supra, was reenacted without change by the Legislature on at least two occasions, namely, upon the adoption of the Code of Alabama 1940 on May 31, 1941, and by Act No. 847, General and Local Acts 1951, page 1477. This may be treated as legislative approval of the construction by the State Department of Revenue of this part of Section 646, supra, prior to amendment in 1953. **State v. H. M. Hobbie Grocery Co.**, 225 Ala. 151, 142 So. 46. However, it will be noted that this exception is confined only to those products known commercially as "kerosene oil," "fuel oil," or "crude oil." I have been informed by certain members of the petroleum industry, the Agricultural Chemistry and Agricultural Industries Divisions of the State Department of Agriculture, and the Gasoline Tax Division of the State Department of Revenue that what is commercially known as "kerosene oil," "fuel oil," and "crude oil" are entirely different products from what is commercially known as "gasoline," "diesel fuel," and "naphtha." I will not undertake to discuss the character and properties of each of these petroleum products for I have been reliably informed by these people that gasoline, diesel fuel, and naphtha are in an entirely different category from kerosene oil, fuel oil, and crude oil, and that they are recognized as separate and distinct products. Therefore, the exception contained in Section 1 of Act No. 369, supra, would apply only to kerosene oil, fuel oil, or crude oil when used for lighting, heating, or industrial purposes. It would not apply when such products are used as a component part of a motor fuel to propel a motor vehicle over the highways of this State. Also, it would not apply to gasoline, diesel fuel, and naphtha.

I am of the opinion that those products commonly known as gasoline, diesel fuel, and naphtha would be taxable under Section 1 of Act No. 369, supra, when sold, delivered, or withdrawn from storage, or kept in storage for sale or delivery in Mobile County, regardless of how such products may be later used; that those products commonly known as kerosene oil, fuel oil, and crude oil will be taxable under said Act when sold, delivered, or withdrawn from storage to be used as a motor fuel or a component part of a motor fuel to propel a motor vehicle over the highways of this State, but such products would not be taxable when used for lighting, heating, or industrial purposes.

3. Your inquiry under question 3, insofar as it relates to whether or not diesel fuel would be exempt under Act No. 369, supra, when sold, delivered, or withdrawn from storage in Mobile County and when not used to propel a motor vehicle over the highways of this State, has already been answered in the negative under questions 1 and 2.

This leaves your inquiry as to whether or not liquid petroleum gas generally known as "LP gas," such as those commonly known as butane and propane, would be subject to the provisions of the Act where persons sell, deliver, store, or withdraw same from storage in Mobile County to be used for lighting, heating, or industrial purposes and not for the purpose of propelling a motor vehicle over the highways of this State. I have been reliably informed by the parties hereinabove mentioned, and I believe it is a matter of common knowledge, that butane and propane and like liquid petroleum gases, when reduced to liquid form, are extensively used as a motor fuel to propel motor vehicles over the highways. These same sources of information have also informed me that these LP gases, such as butane and propane, are separate and distinct products in themselves and do not fall within the category of those products commonly known as kerosene oil, fuel oil, or crude oil. Therefore, as these liquid petroleum gases are derivatives of petroleum used as substitutes for gasoline, diesel fuel, and naphtha, and as these liquid petroleum gases are now generally used as motor fuels to propel motor vehicles over the highways, it is my opinion that they are taxable under Act No. 369, supra, regardless of how used, as the Act does not in any way exempt the handling and use of these products within Mobile County.

4. Under question 4 you ask whether or not the sale of gasoline or other motor fuels coming under the provisions of Act No. 369, supra, would be taxable when made to Mobile County. The exemption contained in Section 1 of the Act exempts "sales of such motor fuels in interstate commerce, or to the federal government or any agency of the federal government, or to the State of Alabama, or to any incorporated municipality for municipal purposes," and as Mobile County is not included among those expressly exempted, this raises the question of legislative intent. Did the Legislature intend to include Mobile County within the scope of the tax?

The levying of license or excise taxes on a county or a municipality is not prohibited by Section 91 of the Constitution of Alabama 1901, or otherwise by law in this State, where the Legislature clearly provides that a county or municipality is to be taxed under the terms of the specific statute involved. The rule is that this intent must be clearly expressed by the language of the statute, or by reading the statute as a whole. When a tax is levied in general terms, with nothing to indicate that it was intended to apply to a county or a municipality, it is well settled that it not apply to either. **County Board of Education v. State,** 237 Ala. 434, 187 So. 414, 419; **State v. City of Montgomery,** 228 Ala. 93, 151 So. 856.

The mere fact that the County was not expressly included among the other government agencies specified in the exemption contained in Section 1 of the Act does not appear to sufficiently indicate that it was the legisla-

tive intent to tax the County under the Act when the Act is considered in the light of the above-stated rules. **City of Birmingham v. Birmingham Business College,** 256 Ala. 551, 56 So. 2d 111, 112. Therefore, as there is no positive or affirmative disclosure in Act No. 369, supra, that the Legislature intended to include Mobile County within the scope of the Act, and as the only disclosure is of a purely negative nature, I am of the opinion that this is not sufficient to warrant my concluding that the legislative intent was that the sales to the County should be taxed under the Act.

5. There are no provisions in Act No. 369, supra, which would exempt farmers, or the gasoline used in farm tractors from this County motor fuel tax. While under certain conditions a part of the State tax on gasoline used in farm tractors is refundable to the farmer under the provisions of Act No. 323, General and Local Acts 1949, page 469 (Title 51, Section 665(21), et seq., 1953 Cumulative Pocket Part, Code of Alabama 1940), these refund laws are not applicable to the Mobile County motor fuel tax, but such laws are confined exclusively to the refund of part of the State tax on gasoline levied under Section 646, et seq., as amended, supra, when the gasoline is used in farm tractors and when such tractors are used solely for agricultural purposes.

6. Under your sixth question contained in your letter and supplemental request of November 29, 1955, you ask whether or not under Section 4 of Act No. 369, supra, the Mobile County governing body can appropriate monies from the proceeds of the tax to defray the cost of collecting the tax.

Act No. 369, supra, contains no provision which would authorize the deduction of any amount from the proceeds of the tax to pay the expenses and costs of administering and enforcing the Act, or collecting the tax. Act No. 369, supra, is silent in this respect. Under Section 5, the Legislature has directed that all amounts collected under the Act shall be disbursed as follows:

> "The proceeds of the tax levied herein shall be paid by the tax collector as follows: 1) One-half of such proceeds shall be paid into the road and bridge fund of Mobile County; and 2) one-half of such proceeds shall be pro rated among the incorporated cities and towns within Mobile County on the basis of the population of such cities or towns."

The rule concerning appropriations of all types, including appropriations for the administration and enforcement of acts of the Legislature, is well stated in 42 Am. Jur., Public Funds, Section 45, as follows:

> "No particular form of words is necessary to constitute a valid appropriation, **but the legislative intent to appropriate funds must be clear and certain; it cannot be inferred by a construction of doubtful acts or ambiguous language.** It is sufficient if an intention to make an appropriation is clearly evinced by the language of the statute, or that no effect can be given to the statute unless it is considered as making the neces-

sary appropriation. Such intention may be ascertained from the entire statute." (Emphasis added.)

Although a careful search has been made, no general laws or local laws relating to Mobile County or the governing body of Mobile County can be found which would authorize such governing body to appropriate any amount to cover the expenses of collecting this tax, or which authorize the Tax Collector to deduct any amount from the proceeds of the tax to cover these expenses. It, therefore, appears that no provisions have been made for an appropriation to defray the expense and costs of collecting this tax, unfortunate as it may seem, and you would not be authorized to make any deductions from the proceeds of the tax for such purposes.

You ask if Section 4 of Act No. 369, supra, would authorize the governing body of Mobile County to make such an appropriation. This section provides that the governing body of Mobile County shall promulgate and adopt rules and regulations necessary for the enforcement and collection of the tax levied under the Act. Such a provision, however, could not delegate to such governing body the power to legislate or to read into the law something that is not there. **State v. Vaughan,** 30 Ala. App. 201, 4 So. 2d 5, 8, cert. den. 241 Ala. 628, 4 So. 2d 9; 12 C. J., Constitutional Law, Section 329. I am of the opinion that this situation cannot be remedied by rules and regulations promulgated by the county governing body.

Yours very truly,

JOHN PATTERSON
Attorney General

December 15, 1955

Honorable George A. Toulmin
Commissioner of Licenses
Mobile County Court House
Mobile, Alabama

Ad Valorem Taxes—Licenses—Motor Vehicles.

1. Where an automobile dealer brings an automobile into the State of Alabama for the first time between October 1, 1954, and the last Monday in February, 1955, purchases a license tag therefor in the dealer's name, or in his company's name, or in some other individual's name prior to the last Monday in February, 1955, such automobile can no longer be considered a part of his stock of goods, wares and merchandise, and the ad valorem tax on such automobile

is due and payable on October 1, 1955, even though said vehicle is allowed to remain in the dealer's showroom or place of business for sale after the last Monday in February, 1955.

2. Affidavit of dealer that such automobile continued as part of his stock of goods, for sales purposes, until some date after the last Monday in February, 1955, was then sold to a certain individual, and was not operated on the public highways of Alabama at any time prior to March 1, 1955 (or the last Monday in February, 1955), is ineffective to relieve such automobile from the ad valorem tax due and payable on October 1, 1955.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an opinion, bearing date of October 19, 1955, addressed to Mr. Ralph Eagerton, Chief, Department of The Examiner of Public Accounts, has been referred to this office for an official opinion. Your request is as follows:

"This has further reference to the subject discussed briefly with Mr. Tobias over long distance this morning.

"On January 11, 1955 the Attorney General of Alabama rendered an opinion,—photostat of which is enclosed herewith,—holding in part that, 'where an automobile dealer of any type or description brings an automobile, new or used, into this state for the first time, between October 1, 1954 and the last Monday in February, 1955, and keeps same in his stock, **and does not sell the car to a customer** until after the last Monday in February, 1955, . . . then such customer would not have to pay the tax under Section 704, supra, on said car when he buys his license tag therefor on October 1, 1955, and would not have to pay such ad valorem tax on the car until October 1, 1956. The automobile dealer or dealers involved would not, under the circumstances, be due to pay any ad valorem tax under Section 704, supra, on said car.' The above citations have reference to Code of Alabama, 1940, Title 51, Section 704, as amended.

"During the period beginning **December 1, 1954,** and ending February 28, 1955, a number of local automobile dealers furnished our office complete information on individual automobiles which had been a part of their stock in trade for sales purposes, and requested that we issue a 1955 motor vehicle license for the operation of each of such individual cars.

"In some cases, the licenses were issued in the names of the automobile dealers or their companies, but mostly they were issued in the name of some individual who was a salesman or other employe of one of the automobile dealers. License tags were issued, as requested and some

time prior to the 10th day of the month following such licensing, the triplicate copy of Motor Vehicle Registration and Tax Receipt was forwarded to the State Department of Revenue in Montgomery for record there.

"In view of the fact that such cars had been licensed for operation on the public highways of the state of Alabama prior to the last Monday in February, our office has been requiring the payment of ad valorem taxes for the tax year 1954-1955 on such licensed automobiles, taking the position that such licensing is prima-facie evidence of individual ownership prior to March 1, 1955.

"It is our understanding, however, that most, if not all, of these cars continued in the sales rooms of the automobile dealers as a part of their stock in trade,—for sales purposes,—until they were sold on, or after March 1, 1955 and the invoice or bill of sale in each instance was dated accordingly.

"In view of the foregoing statement of facts, we would like to be able to issue 1956 motor vehicle licenses to individual owners of such motor vehicles, free of ad valorem tax, provided such vehicles remained as a part of the subject dealer's stock in trade for sales purposes until March 1, 1955 and were then sold to an individual for his use, in spite of the fact that such vehicle had been licensed for use on or prior to the last Monday in February, 1955; **provided, however,** that the applicant for 1956 license present, at the time he applies for such 1956 license, (for attachment to his 1956 Motor Vehicle Registration and Tax Receipt) a sworn to affidavit in the form submitted herewith for your consideration and approval.

"If our suggested form is not sufficient in any respect, or if you decide such licenses cannot be issued until ad valorem taxes for the tax year 1954-1955 have been paid by either the owner or the dealer from whom he bought the car, please so advise us."

The affidavit form submitted with your inquiry is as follows:

"A F F I D A V I T

"STATE OF ALABAMA)
COUNTY OF MOBILE)

"Before me, a Notary Public in and for said State and County, personally appeared:

an official of ———————————————————————

whose business address is ———————————————————————

Alabama, who being by me first duly sworn, deposes and says that he is an official of the above named motor vehicle dealer or company and that he is personally cognizant of the facts herein testified to; that the motor vehicle described on the attached Bill of Sale first came into the State of Alabama on the following date: ————————, 1955; that the said motor vehicle became a part of the stock-in-trade of said dealer or company on said date and continued as such stock-in-trade, for sales purposes, until the following date:————————, 1955, and was then sold to the individual named in said Bill of Sale, to-wit, Mr. ————————, whose address is ———————— St.,

————————, Alabama; that said motor vehicle was not operated on the public highways of Alabama at any time prior to March 1, 1955.

———————————————————————

Signature of motor vehicle dealer or official

———————————————————————

Address of above signer

"Sworn to and subscribed before me this ————day of ————, 1955. (SEAL)

———————————————————————

Notary Public
"My Commission expires

————————, 1955"

This office has also received a letter from Mr. W. W. Lazenby, Tax Assessor of Lee County, Opelika, Alabama, requesting an opinion involving the same set of facts. This opinion should suffice to answer both requests.

With respect to the Alabama State and county ad valorem tax due and payable on automobiles on October 1, 1955, the lien attaches on the law day, October 1, 1954. Title 51, Section 884, Code of Alabama 1940, as amended by

Act No. 692, General and Local Acts 1953, page 944. **United States v. Alabama,** 313 U. S. 274, 61 S. Ct. 1011.

Before paying the automobile license tax required under the provisions of Act No. 315, General and Local Acts 1951, page 610 (Title 51, Section 693(1), Cumulative Pocket Part, Code of Alabama 1940), and under the provisions of Title 51, Section 693, Code of Alabama 1940, as amended by Act No. 206, General and Local Acts 1951, page 468, payment of the ad valorem tax for the "preceding year" is required under the provisions of Title 51, Section 704, Code of Alabama 1940, as amended by Act No. 314, General Acts 1945, page 504. Section 704, as amended, supra, also provides in Subsection (c) thereof that, "Motor vehicles brought into this state after the first day of October and before the tax assessor has completed his assessment shall be subject to taxation the same as if it had been held or owned in the state on the first day of October." Therefore, if an automobile was in the State of Alabama on October 1, 1954, or brought into Alabama before the tax assessor has completed his assessment (the last Monday in February, 1955—Title 51, Section 57, Code of Alabama 1940), there would normally be due and payable on October 1, 1955, the ad valorem tax.

Subsection (d) of Section 704, as amended, supra, provides, in part, as follows:

> ". . . The judge of probate **shall not issue a license to operate a motor vehicle on the highways of this state until all ad valorem taxes due the said state, counties and cities are paid for the preceding year as shown by a receipt of the tax collector.** Nothing herein shall be construed as affecting the assessment of the stock of goods, wares and merchandise of motor vehicle dealers, or the inclusion of motor vehicles or capital invested therein in making such assessments; nor shall the provisions hereof be construed as imposing an ad valorem tax upon a motor vehicle for the tax year preceding the tax year in which application for such motor vehicle license is made, **unless such motor vehicle was subject to such assessment, otherwise than as constituting a part of the stock of goods, wares and merchandise of a dealer." (Emphasis added.)**

The substance of the opinion to you under date of January 11, 1955, referred to in your requests, which opinion is reaffirmed, is that where an automobile dealer brings an automobile, new or used, into this State for the first time between October 1, 1954, and the last Monday in February, 1955, and keeps same in his stock and does not sell the car to a customer until after the last Monday in February, 1955, such automobile would not be subject to ad valorem tax when the purchaser thereof buys his 1956 license tag on October 1, 1955.

Here, we have a situation in which the dealer in automobiles has applied for and obtained license tags for certain automobiles brought into this State for the first time between October 1, 1954, and the last Monday in February, 1955, which became a part of his stock of goods, wares and

merchandise on the date they came into this State, the license tags therefor being issued during the period October 1, 1954, to the last Monday in the following February, 1955. It is noted that in some cases the license tags have been issued in the names of the dealers or some individuals who are salesmen or other employees of the dealers, and the automobiles are then allowed to remain at the dealer's place of business for sale until some date subsequent to the last Monday in February, 1955.

It is my opinion that when the license tags were obtained for the automobiles involved, such automobiles then and there became cloaked with an ownership in the name of the parties to whom the tags were issued and could no longer be considered a part of the stock of goods, wares and merchandise of the dealer. Having been thus removed from the dealer's stock of goods prior to the last Monday in February, 1955, the ad valorem tax lien attached as of October 1, 1954, and such lien remains until the amount of tax due is paid. Such being the case, said automobiles come within the last underscored proviso of Section 704(d), supra, which provides, **"unless such motor vehicle was subject to such assessment, otherwise than as constituting a part of the stock of goods, wares and merchandise of a dealer."** (Emphasis added.) The act of obtaining license tags for the automobiles in the name of certain parties would remove such automobiles from the status of being a part of the dealer's stock of goods even where they are allowed thereafter to remain in the dealer's display rooms until after the last Monday in February, 1955, and the ad valorem tax on such automobiles is, in my judgment, due and payable on October 1, 1955.

It is my further opinion that neither the affidavit suggested in your inquiry nor any other form of affidavit could alter the conclusion expressed above.

Yours very truly,

JOHN PATTERSON
Attorney General

December 21, 1955.

Hon. George A. Toulmin,
Commissioner of Licenses,
Mobile County,
P. O. Box 91,
Mobile, Alabama.

Licenses—License Commissioners—Judges of Probate—Counties— Mobile County.

1. Under the provisions of Title 51, Section 697, Code of Alabama 1940, in cases where the manufacturer's rated capacity is stamped on a truck, the truck license is to be measured by such rated capacity.

2. In cases where the manufacturer stamps only the model number on the truck and does not indicate the tonnage, determination of the correct rated capacity of the truck for the purpose of the license is required to be made by using the model number in connection with the registration data which is published and furnished by the manufacturer to the State Department of Revenue, and, in turn, furnished by the Department to all probate judges, commissioners of licenses, and license inspectors.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of October 14, 1955, is as follows:

"Your official opinion is requested in the following matter:

"During the immediate past license year, a number of citations were issued by the field agents for the State Department of Revenue citing truck operators for operating trucks bearing license of a lower tonnage classification than that claimed by the field agent. In these cases there is apparently a clear dispute between the operators and agents as to what is the correct rated tonnage capacity on each truck involved.

"The original license is sold based upon the manufacturer's rated capacity as shown by the dealer on the bill of sale, but according to the state agents the manufacturers are in some instances not rating their trucks according to their actual tonnage capacity and as the operators are relying upon the manufacturer's rated capacity a clear dispute arises in these matters.

"In some instances we have information as to tonnage, available from various sources, to substantiate either the agent or operator, and in these cases there is no question, however, in many there is no information available supporting either contention.

"In view of these facts would you please advise if, when issuing the 1956 license to the operator, whose claim is disputed, I am required to issue a license as shown in the citation for last year of the state agent or am I to issue the license requested by the operator as shown by his bill of sale?

"In this matter your attention is invited to the provisions of Title 51, Section 708-C as set out in the pocket parts to the Code of Alabama.

"See also Title 51-Section 697 and State vs. Hobbie Grocery Co., 225 Alabama 151, 142 So. 46 and 25 Ala. App. 144, 142 So. 113."

Title 51, Section 697, Code of Alabama 1940, provides in material part that, "For each motor truck the following license based on the manufacturer's rated capacity stamped on the truck shall be charged."

The language of the statute is clear that the measure of the truck license is to be based "on the manufacturer's rated capacity stamped on the truck." Obviously, confusion has been caused in some cases due to the fact that some of the manufacturers stamp only the model number on a truck without also indicating the capacity thereof. All manufacturers are required to furnish to the State Department of Revenue registration data which purports to show the actual tonnage or rated capacity of trucks of the model shown by the number stamped on the trucks. This registration data is required to be furnished by the manufacturer to the State Department of Revenue each year as the new models of trucks are released, and, in turn, such data is "multilithed" or printed by the Department and distributed to all probate judges, license commissioners, and license inspectors in the State.

Since the truck license law was last amended and put in its present form by Act No. 93, General Acts 1936-37 (Ex. Sess.), page 108, and effective April 1, 1937, the rated capacity of a truck has been determined by the Department of Revenue and its agents by first ascertaining the model number stamped on the truck; and if the tonnage is not also stamped on the particular truck involved, then by using such model number as a key number in referring to the registration data furnished as aforesaid to the Department by the manufacturer. As this is allegedly the practice which has been followed by the Department throughout the State since 1937, it is presumed that the State agents, in the cases to which you refer, followed this practice in determining the rated capacity of the trucks in Mobile County and that the citations were issued by them to the truck operators on such basis.

The practice of checking the model number stamped on the truck against the registration data published and furnished by the manufacturer appears to be a reasonable one under the statute involved, and in keeping with the basis described therein by the Legislature for determining the rated capacity of a truck for the purpose of the license. This construction given the statute by the Department of Revenue follows the wording of the statute itself very closely, and should be given great weight. **Waters v. State,** 25 Ala. App. 144, 142 So. 113; **Dixie Coaches v. Ramsden,** 238 Ala. 285, 190 So. 92, 94; **Great Northern Life Ins. Co. v. Read,** 136 F. 2d 44, 47. This is particularly true as it

is the policy of the Department which has been followed for several years, and this policy offers a uniform basis for determining the rated capacity of a truck in each case.

Moreover, under the provisions of Title 51, Section 835, Code of Alabama 1940, as amended by Act No. 610, General and Local Acts 1951, page 1053, and particularly subsection (b) thereof, only the license inspector or the State Department of Revenue, or its agents, have the right to determine the liability of a delinquent license taxpayer. Subsection (b) expressly provides that the probate judge does not have this authority. You, as License Commissioner of Mobile County, having taken over the duties of the judge of probate, insofar as the issuance and collection of State and county motor vehicle and privilege licenses are concerned, are subject to this same provision.

The special act relating to the creation of the office of License Commissioner of Mobile County, Act No. 245, General Acts 1945, page 367, has not superseded the provisions of Section 835, as amended, supra, for Section 12 of said Act places the License Commissioner of Mobile County in the same status as a probate judge when issuing and collecting motor vehicle and privilege licenses.

I am, therefore, of the opinion that in issuing a truck license you should be governed by the manufacturer's rated capacity when such rated capacity is stamped on the truck. In cases where only the model number is stamped on the truck, then, in determining such rated capacity, you are required to use the registration data which has been furnished by the manufacturer to the State Department of Revenue, and, in turn, furnished to you by the Department. You are not authorized to use bills of sale, invoices, or other like documents which purport to give the necessary information because such documents are not recognized as being official or conclusive in ascertaining the tonnage of the truck.

In cases of a delinquent truck license, the law requires that the determination of liability made by the license inspector or the Department, or its agents, be followed. Therefore, in the case about which you inquire, you would be required to issue a license in accordance with the determination made by the State agents in the citation.

In connection with your inquiry, you refer us to the cases of **State v. H. M. Hobbie Grocery Co.**, 225 Ala. 151, 142 So. 46, and **Waters v. State, supra.** Your attention is called to the fact that, while these cases do not appear to be in conflict with the ruling in this opinion, it is well to note that in both cases the court had before it the 1927 truck license law, namely, Section 17

of Act No. 163, General Acts 1927, page 139. This law was amended and put in its present form by Act No. 93, supra, and it was not until this last amendment that the basis for measuring the license was made "the manufacturer's rated capacity stamped on the truck."

Yours very truly,

JOHN PATTERSON,

Attorney General.

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